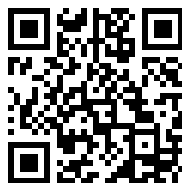

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EXCOMMUNICATION

ITS NATURE, HISTORICAL DEVELOPMENT
AND EFFECTS

A DISSERTATION

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Catholic University of America in partial
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by

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FOREWORD

The object of this present dissertation is to present, as briefly as the subject allows, a study of the nature, historical development and effects of the censure of excommunication. Excommunication is the gravest of all canonical punishments; it separates the delinquent from the communion of the faithful, and, practically speaking, deprives him of all the rights of membership in the Church of Christ. Were its dreadful character better known, no doubt the ends of ecclesiastical penal legislation would be more efficiently attained.

In the early ages the word *excommunication* was a generic term used to designate all ecclesiastical punishments and remedies. Consequently, the history of the censure of excommunication is very closely connected with that of ecclesiastical punishments in general; at times they are so closely allied that it is impossible to discriminate between them. Hence this work does not contain an exhaustive study of the history of excommunication. An attempt has been made, however, to gather together the salient points in its historical development.

Naturally, more attention has been given to the study of the effects of excommunication because of their practical importance. Excommunication is a medicinal punishment; its primary and immediate purpose is to bring the delinquent back to a sense of duty. The many and grave effects which follow upon the censure of excommunication are well calculated to accomplish this purpose. The effects of excommunication are, as Cerato (*Censurae Vigentes*, n. 37) remarks “*totidem auxilia ac voces, quibus Pia Mater Ecclesia delinquentem et contumacem ad poenitentiam et ad salutem adducere contendit.*”

A few words must be added concerning the arrangement of the matter. The dissertation is divided into two parts. The first part comprises three chapters, which treat of the nature of excommunication, its historical development, the distinction between the *vitandi* and the *tolerati* and communication in profane matters. The last-mentioned subject should have been treated in the second part of the dissertation together with the other effects of excommunication. Since, however, it is so closely, in fact almost inseparably, united with the distinction between the *vitandi* and the *tolerati*, it was deemed more advisable to treat of it in connection with this distinction. The second part of the dissertation deals with the effects of the censure. In commenting upon the effects of excommunication, the writer has strictly adhered to the order of the canons.

The writer takes this occasion to express his sincere gratitude to the Faculty of Canon Law at the Catholic University for their kind interest and generous assistance throughout his course and especially in the preparation of this dissertation.

PART I

CHAPTER I

THE NATURE OF THE CENSURE OF EXCOMMUNICATION

CANON 2257

§ 1. *Excommunicatio est censura qua quis excluditur a communione fidelium cum effectibus qui in canonibus, qui sequuntur, enumerantur, quique separari nequeunt.*

§ 2. *Dicitur quoque anathema, praesertim si cum sollemnitatibus infligatur quae in Pontificali Romano describuntur.*

Etymologically, excommunication (Lat. *ex*, out of, away from; *communicatio*, communication) signifies the separation of one from communication with others. In ecclesiastical law, it designates the act of excluding, or the state of being excluded from communication with the faithful, and is defined as a censure by which a person is excluded from the communion of the faithful with the effects which are enumerated in the canons and which cannot be separated.¹

Generically, therefore, excommunication is a censure, that is, a penalty by which a baptized person, delinquent and contumacious, is deprived of some spiritual goods, or goods annexed to spiritual things, until he ceases to be contumacious and is absolved.² A censure is a penalty, that is, a privation of some good, inflicted by legitimate authority for the correction of the delinquent and punishment of the offence.³ It is a spiritual pen-

¹ Can. 2257, § 1.

² Can. 2241, § 1.

³ Can. 2215.

alty, not only because it proceeds from a spiritual power and is inflicted for a spiritual purpose, but especially because it deprives ~~one~~ of spiritual goods, although secondarily it deprives one of temporal goods also.⁴ Moreover, it is a medicinal penalty, for its primary and immediate purpose is the emendation of the delinquent.

In order that one may be punished by a censure, he must be baptized, delinquent and contumacious. He must be baptized, for only by a baptism does one become directly subject to the jurisdiction of the Church; baptism is a requisite for subjection to all ecclesiastical laws. He must be delinquent, that is, guilty of an external and morally imputable violation of a law or precept to which is added, at least indeterminately, a canonical sanction;⁵ this is a requisite for incurring any ecclesiastical penalty. Finally, he must be contumacious; it is this element which is proper to censures and serves to distinguish them from all other ecclesiastical punishments; a censure is a medicinal penalty, its primary and immediate purpose being to correct the offender; hence it presupposes contumacy.

A censure deprives one of *some* spiritual goods, or goods annexed to spiritual matters. There are some spiritual goods of which the Church cannot by censure or any other means deprive the faithful, ex gr., divine grace, internal virtues, the power of orders, etc.⁶ A censure can deprive one only of those spiritual goods which are within the power of the Church, ex. gr., the administration and reception of the sacraments, indulgences, jurisdiction, ecclesiastical burial, etc., and also of temporal goods which have some relation to spiritual matters, ex. gr., the emoluments of a benefice, the administration of ecclesiastical goods, etc.⁷

⁴ Sole, *De Delictis et Poenis*, n. 157.

⁵ Can. 2195.

⁶ Sole, *De Delictis et Poenis*, n. 157.

⁷ *Ibidem*.

Two conditions are required before a censure ceases; the contumacy must cease and absolution must be obtained.

Canon 2241, § 2 warns all who have the power to inflict censures to make a sober and careful use of them, especially of such as are incurred by the very commission of the delict (*latae sententiae*), and more particularly of excommunication. It may be well to repeat here the warning of the Council of Trent:

Quamvis excommunicationis gladius nervus sit ecclesiasticae disciplinae et ad continendos in officio populos valde salutaris, sobrie tamen magnaue circumspeditione exercendus est, cum experientia doceat, si temere aut levibus ex rebus incutiatur, magis contemni quam formidari, et perniciem potius parere quam salutem.⁸

There are three species of censures, namely; excommunication, suspension and interdict.⁹ A brief comparison of them will not be amiss and will no doubt help to a better understanding of the nature and gravity of excommunication.

The interdict is a censure by which the faithful while remaining in communion with the Church are forbidden certain sacred benefits mentioned in the canons (2270-2277).¹⁰ Suspension is a censure by which a cleric is forbidden the exercise of his office, or benefice, or both.¹¹

Suspension, of course, can affect only clerics; an interdict, both clergy and laity. Both can be imposed upon a moral person, or community. An interdict can also be local. Excommunication can affect both clergy and laity, but only physical persons; hence if it is imposed upon a moral person or community, it is understood as affecting only the individuals who cooperated in the delict.¹²

⁸ Sess. XXV, *de Ref.*, cap. 3.

⁹ Can. 2255, § 1.

¹⁰ Can. 2268, § 1.

¹¹ Can. 2278, § 1.

¹² Can. 2255, § 2.

Interdict and suspension can be employed either as censures or as vindictive penalties. Excommunication, however, is always a censure; hence, it can never be inflicted for a determined period of time, but only until the guilty one has given up his contumacy and obtained absolution.¹³

Excommunication places one outside the communion of the faithful; interdict and suspension are punishments imposed upon persons while remaining in communion with the Church. The latter usually deprive a person only of some of the rights resulting from his position or membership in the Church; the former divests one of "all the rights resulting from the social status of the Christian as such."¹⁴ The effects of excommunication concern personal spiritual benefits and favors, that is, such as touch the soul and salvation of the individual, whereas the privations entailed by the other two censures are not of such an individual spiritual character.¹⁵

Thus it is clear from what has been said, and it will be more apparent later on, that of the three species of censures, excommunication is by far the most severe. It is the gravest of all canonical punishments, "*quum Ecclesia non habeat ultra quid faciat.*"¹⁶ It is often likened to death. Saint Jerome¹⁷ and Saint Augustine¹⁸ compare it to the expulsion of Adam from Paradise. It is very aptly called *an exile from the Church of Christ*. "For as a Roman citizen condemned to exile lost all his rights of citizenship, so also does an excommunicate become divested of all his rights as a citizen of the city of God on earth, that is, as a member of the true Church."¹⁹

Specifically, excommunication differs from the other censures in this that it separates one from the communion

¹³ Can. 2255, § 2; cf. Can. 2241, § 1.

¹⁴ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 678.

¹⁵ Cf. Suarez, *De Censuris*, disp. XVIII, s. 2, n. 3. Cf. however, can 2275.

¹⁶ C. 10, X, *de iudiciis*, II, 1.

¹⁷ *Comment. in Osae*, lib. II, cap. IV, MPL, 25, 870.

¹⁸ *De Genesi ad Litteram*, lib. II, cap. XL, MPL, 34, 451.

¹⁹ Smith, *Elements of Ecclesiastical Law*, III, n. 3188.

of the faithful. What is to be understood by the *communion of the faithful*? It may be said that among the faithful there are three kinds of communion. In the first place, there is that purely internal communion by which the faithful are united among themselves and with Christ, and which consists in the bonds of divine grace, faith, hope and charity. Secondly, there is a communion among the faithful that is altogether exterior and comprises the ordinary civil and social relations of daily life. Finally, there is what might be called a *mixed* communion, consisting of "certain ecclesiastical and exterior acts and ceremonies that produce spiritual favors and blessings, by virtue of their institution, as the sacraments, the public prayers and suffrages of the Church, the Sacrifice of the Mass, benedictions and other religious ceremonies and public acts of divine worship: the satisfaction and merits of our Lord and the Blessed Virgin and the Saints, as contained in the treasury of the Church and dispensed by her to the faithful by means of indulgences." ²⁰

From which of these communions does excommunication exclude? It is clear that the Church cannot by excommunication or any other means deprive a person of that purely internal communion, consisting of divine grace and internal virtues. The existence of them does not depend exclusively on the will of the Church. They are not forfeited save by a voluntary action of the possessor. Sanctifying grace can be lost only by mortal sin. The infused theological virtue of charity is lost together with sanctifying grace by any mortal sin, but the infused theological virtues of faith and hope are forfeited only by the commission of mortal sins directly opposed to these virtues. Indeed, excommunication may be, and almost always is, a sign that sanctifying grace and one or more of the infused virtues have been forfeited. Of itself, however, excommunication does not and cannot destroy them. Moreover, it cannot prevent a per-

²⁰ Smith, *Elements of Ecclesiastical Law*, III, n. 8190.

son from recovering sanctifying grace and the concomitant virtues, for one may do so by an act of perfect contrition.

Excommunication may divest one of that purely external communion consisting of the social and civil affairs of every-day life. Since communication in profane matters can and ought to be directed by the faithful to a spiritual end, and since the refusal of such communication is well calculated to bring the offender to repentance, there is no doubt but that the same can fall under the prohibition of the Church.

The communion of the faithful, however, from which excommunication primarily excludes is that which is called *mixed*, and which is composed of the faithful in so far as they constitute a society under the authority of the Church. By virtue of this communion, the faithful share in all the blessings of the Christian society which Christ wished to confer upon them through the ministry of His Church. By excommunication a person is deprived of participation in all such blessings. Hence an excommunicated person is not only excluded from legal ecclesiastical acts, forbidden the exercise of jurisdiction in both forums, deprived of the rights of election, presentation and nomination, etc., but is also deprived of such altogether spiritual blessings as the use of the sacraments, a participation in the indulgences, suffrages and public prayers of the Church, of the right to assist at the divine offices, etc., for all these Christ left to the administration of His Church. Thus we see how erroneous it would be to hold that the effects of excommunication are of a merely external character. Certainly a censure which deprived one of the right to assist at sacred rites, of a sharing in the indulgences, suffrages and public prayers of the Church, and, above all, of the use of the sacraments affects the very soul and prevents a man from acquiring countless and inestimable graces. In the Bull "*Exsurge Domine*" of June 15, 1520, Pope Leo X proscribed the following proposition (XXIII), formulated from the teachings of Martin Luther: "Excom-

municationes sunt tantum externae poenae, nec privent hominem communibus spiritualibus Ecclesiae orationibus.”²¹ The forty-sixth proposition of the Synod of Pistoia asserting, “effectum excommunicationis exterio-rem dumtaxat esse, quia tantummodo natura sua excludit ab exteriori communicatione Ecclesiae” was condemned in the Constitution “*Auctorem Fidei*” of August 28, 1794, “quasi excommunicatio non sit poena spiritualis, ligans in coelo, animas obligans.”²²

An excommunicate does not, of course, cease to be a Christian. The baptismal character is indelible and hence cannot be effaced by excommunication. Does such a one, however, cease to be a member of the Church? Since this question has more of a dogmatic than a canonical character, the writer will content himself for the most part with giving a résumé of the teaching of dogmatic theologians.

The question as to whether excommunicates cease to be members of the Church has given rise to quite a controversy among theologians.²³ Suarez is of the opinion that persons under ban of excommunication continue to be members of the Church. He states that the Fathers do not teach that excommunicates are placed outside the Church, but rather that they are separated from communication with the Church: that a person can retain his citizenship in a state and yet be deprived of the society of his fellow-citizens. “Quapropter excommunicatus non dicitur habendus ethnicus simpliciter, sed *tanquam ethnicus* quantum ad communicationem cum aliis.”²⁴

Bellarmino maintains that excommunicates cease to be members of the Church.²⁵ He argues in the first place from the text in Saint Matthew's Gospel: “If he will not hear the Church, let him be to thee as the heathen and publican.”²⁶ He draws his second argument from a

²¹ *Fontes*, n. 76.

²² *Fontes*, n. 475.

²³ Cf. Murray, *Tractatus de Ecclesia Christi*, disp. III, sect. VIII, n. 118.

²⁴ *De Fide*, disp. IX, s. 1, n. 16.

²⁵ *De Conciliis*, lib. III, cap. VI.

²⁶ XVIII, 17.

canon in the Decree of Gratian which reads as follows: "Canonica instituta, et sanctorum Patrum exempla sequentes, Ecclesiarum Dei violatores, auctoritate Dei et iudicio sancti Spiritus, a gremio sanctae matris Ecclesiae, et a consortio totius Christianitatis eliminamus."²⁷ He supports his contention by many references to the writings of the Fathers. His final argument is one of reason. In the first place, he points out that excommunicates are deprived of all spiritual communication which is common to the members of the Church; consequently, they are not members of the Church. Secondly, excommunication has the same place in the Church that the penalty of death had in the Old Testament and still has in civil society; but by death, men are entirely separated from society. Thirdly, excommunication is the most severe penalty which the Church can inflict; hence if excommunication does not deprive of membership in the Church, then there is a graver penalty than excommunication, namely, privation of membership in the Church. Fourthly, excommunication cannot be imposed except upon those who are contumacious; consequently it entails banishment from the Church; if excommunication was a penalty less severe than banishment from the Church, it would sometimes be imposed upon grievous sinners even though they were not contumacious. Finally, when excommunicates are absolved, it is said: "Restituo te unitati Ecclesiae et membrorum participationi";²⁸ this is an evident sign that the excommunicates were separated from the unity of the Church.

According to some of the more recent writers on dogmatic theology, the solution of the question hinges upon the will of the Church.²⁹ It is certain that the Church has the right and power to cut off entirely from membership in the Church not only heretics and schismatics, but like-

²⁷ C. 107, C. XI, q. 3.

²⁸ The latest edition of the Roman Ritual reads: " * * * restituo te communioni et unitati fidelium. * * * " Tit. III, cap. III.

²⁹ Murray, *Traotatus de Ecclesia Christi*, disp. III, sect. VIII, n. 119; Mazzella, *De Religione et Ecclesia*, n. 609.

wise other grievous sinners.³⁰ Does the Church intend by excommunication to deprive one entirely of membership in the Church, or does she intend only to deprive the delinquent of the blessings and rights which accompany membership? In answer to this question, most of the recent dogmatic theologians distinguish between the *tolerati* and the *vitandi*. According to the more common opinion, the *tolerati* do not cease to be members of the Church, for the Church, in so far as she tolerates them, does not totally exclude them from her pale. With regard to the *vitandi*, the more commonly accepted opinion maintains that they cease to be members of the Church, since, at least temporarily, they are cut off from all external communion with the Church.³¹ Tanqueray remarks that the question has little practical bearing, since the Church is wont to declare as *vitandi* only notorious heretics and schismatics who have already ceased to be members of the Church by reason of notorious heresy or schism.³² Murray states that although it is not certain that the Church intends, *eo ipso et vi excommunicationis denuntiatae*, to expel every *vitandus* from the Church, the Church can pronounce excommunication in a form that will leave no room for doubt as to its intention.³³ A recent example of this was given by the Holy Office on November 8, 1922. In declaring two persons *vitandi*, the Holy Office stated that they were altogether expelled from the bosom of the Holy Church of God, “e gremio Sanctae Dei Ecclesiae penitus ejici.”³⁴

It must be remembered, of course, that all validly baptized persons can be said to be members of the Church, at least in the sense that *per se* they are subject to the laws of the Church. It would seem, too, that no notorious

³⁰ Murray, *op. et loc. cit.*; Mazzella, *op. et loc. cit.*; Billot, *Tractatus de Ecclesia Christi*, p. 308.

³¹ Tanqueray, *Synopsis Theologiae Dogmaticae*, I, n. 905; Billot, *Tractatus de Ecclesia Christi*, p. 310; Mazzella, *De Religione et Ecclesia*, n. 608; cf. Murray, *Tractatus de Ecclesia Christi*, disp. III, sect. VIII, n. 119.

³² *Op. et loc. cit.*

³³ *Op. et loc. cit.*

³⁴ *AAS*, XIV, p. 593.

excommunicate retains full and perfect membership in the body of the Church, for such a one deprived, even in the external forum, of canonical communion which is one of the requisites for full and perfect membership in the body of the Church.³⁵

Perhaps, after all, the foregoing controversy is one merely of words. Practically speaking, excommunicates are deprived of all the blessings and rights which accompany membership in the Church of Christ. Hence the question whether they are really deprived of membership in the Church seems to be one of theory and of little practical import.

Canon 2257, § 2 states that excommunication is also called *anathema*, especially when it is inflicted with the solemnities which are described in the Roman Pontifical. For an explanation of the term *anathema* and of its use in ecclesiastical penal legislation, the reader is referred to the chapter on the historical development of the censure of excommunication.³⁶

³⁵ Cf. Tanqueray, *Synopsis Theologiae Dogmaticae*, I, n. 897; Joyce, "Church," *Catholic Encyclopedia*, III, 755.

³⁶ Chapter II, p. 22 ff.

CHAPTER II

HISTORICAL DEVELOPMENT OF THE CENSURE OF EXCOMMUNICATION

Excommunication, in general, is nothing more than the separation of one from the society of others. "Every human society which has an external organization must possess the right to expel from its body or membership any refractory member who, by his own fault, has rendered himself unworthy of belonging to it and enjoying its benefits and advantages. For it is plain that the expulsion of stubborn and ungovernable members is not only necessary to protect the honor and good name of a society, but, moreover, the only means of preserving its very existence. Hence we see, as a matter of fact, that every society, association, club or guild, no matter how small, has exercised and does exercise this power. Civil society or the State makes use of this power on a large scale. It cuts off bad and unruly citizens from communion with others by imprisonment, exile and even death."¹

Religious societies are no exception to this rule. In fact, it is much more imperative that organizations whose principal aim is the sanctification of its members should have the right to expel from its communion obstinate members who, though repeatedly warned, nevertheless continue to scandalize others and bring religion itself into disrepute by their disgraceful living.² Thus it is that punishments analogous to excommunication were employed by the pagan and heathen religions of old.

¹ Smith, *Elements of Ecclesiastical Law*, III, n. 3161.

² Smith, *Elements of Ecclesiastical Law*, III, n. 3162.

I. PRE-CHRISTIAN EXCOMMUNICATION

1. *Pagan Analogies*

Among the primitive Semitic peoples it was recognized that when persons were placed under a ban or taboo, restrictions were put on communicating with them and that the infraction of these was thought to involve supernatural dangers.³ Among the Greeks there was the *χερνιβῶν ἐπρυεσθαι*,⁴ that is, the exclusion of a person from purification with holy water. This penalty was incurred by persons guilty of bloodshed. The Roman *diris devotio* was a punishment somewhat similar to the Christian excommunication.⁵ Caesar informs us that the inhabitants of Gaul who did not obey the decrees of the Druid priests were excluded from public worship and that among the Gauls this was a very grave punishment. Persons under ban of it were shunned by all.⁶ Among the Germans, as Tacitus narrates, the greatest disgrace was incurred by losing a shield in battle. Persons guilty of this were deprived of all civil and religious rights. To many, death was preferable to such public contempt and to avoid it many hanged themselves.⁷

2. *Hebrew Excommunication*

The penalty of excommunication was in vogue among the Hebrews. In the first book of Esdras, we read that Esdras convoked at Jerusalem an assembly of all the Jews who had returned from captivity and decreed that "whosoever would not come within three days, according to the counsel of the princes and ancients, all his substance should be taken away, and he should be cast out of the company of them that were returned from captivity."⁸ This was evidently excommunication, and there does not seem to be any sufficient reason for main-

³ *Encyclopedia Britannica*, Vol. X, art., "Excommunication."

⁴ Demosthenes, 505, 14.

⁵ Cf. Crnica, *Modificationes in Tractatu de Censuris*, p. 67.

⁶ *De Bello Gallico*, lib. 6, c. 13.

⁷ *Germania*, c. 6.

⁸ X, 7ff.

taining, that before the time of Esdras, this sort of penalty was unknown.⁹ It was a well-known penalty at the time of Christ who warned His disciples that they would have to suffer it for His sake.¹⁰

Hebrew excommunication consisted in the privation either of sacred or of civil rights, and sometimes of both.¹¹ Authors do not agree as to the number and kinds of excommunication which were in use among the Jews. Some mention three species, namely; Niddui, Cherem and Schammatha.¹² "The first marks the minor excommunication, the second the greater, and the third designates a still more terrible sort of excommunication to which the penalty of death is said to have been attached and from which no one could absolve."¹³ It seems very doubtful, however, whether these three species of excommunication were in use among the pre-Christian Hebrews.¹⁴ Selden maintains that there never existed among the Jews more than two kinds of excommunication, a greater and a lesser excommunication.¹⁵ The former excluded a person for an indefinite period from the society of the members of the Hebrew Church; the latter excluded from social communication and from the synagogue, usually for a period of thirty days.¹⁶ The discrepancy among authors as to Hebrew excommunication is, as Crnica remarks, "pro re nostra parvi momenti. Quod speciatim pro nobis valorem habet, est quod apud Judaeos excommunicationem jam in certa et determinata forma * * * extitisse tanquam medium omnino necessarium pro conservatione ordinis et disciplinae."¹⁷

⁹ Dixon, *A General Introduction to the Sacred Scripture*, II, p. 50ff; cf. Exodus XXX, 30, 38; XXXI, 14; Leviticus XVII, 4; Numbers XVI; Judges V, 23.

¹⁰ Dixon, *loc. cit.*; cf. Luke VI, 22; John IX, 22; XII, 42; XVI, 2.

¹¹ Dixon, *op. cit.*, p. 51.

¹² Cf. Smith's *Dictionary of the Bible*, I, art. "Excommunication"; Crnica, *Modifikationen in Tractatu de Censuris*, p. 67; Dixon, p. 51.

¹³ Dixon, *loc. cit.*

¹⁴ Seisenberger, *Practical Handbook for the Study of the Bible*, p. 138.

¹⁵ *De Synedrüs et Praefecturis Juridicis Veterum Ebraeorum*, L. 2, c. 7.

¹⁶ Dixon, *loc. cit.*

¹⁷ *Modifikationen in Tractatu de Censuris*, p. 69.

II. CHRISTIAN EXCOMMUNICATION

1. *The Right of the Church to Excommunicate*

The Christian Religion, too, has from the very beginning claimed and exercised the right to excommunicate gravely delinquent and contumacious members. There is no doubt but that the various kinds of excommunication employed by the Church in the early ages were somewhat similar to the Jewish forms of excommunication.¹⁸ From this, however, we must not conclude that the excommunicatory discipline of the Church derived its origin from the Hebrew practice. The right of the Church to excommunicate is an immediate and necessary consequence of the fact that it was established by Jesus Christ as a perfect society for the salvation of souls. Consequently, the Church enjoys all the means which are necessary for the attainment of this end, and no doubt one of these means is the power of punishing delinquents, even, if necessary, by depriving them of communication with the Church.¹⁹ This right which, as all admit, is necessary to every society that it may function well and survive, must with greater reason be acknowledged in the Church, whose principal object in punishing offenders with excommunication is to secure their emendation.

This argument from reason is confirmed by texts of the New Testament, the example of the Apostles and the practice of the Church throughout the ages. The words of Christ: "Whatsoever you shall bind upon earth, shall be bound also in heaven; and whatsoever you shall loose upon earth, shall be loosed also in heaven,"²⁰ refer not only to the power of forgiving sins but likewise to "all spiritual jurisdiction, including judicial and penal sanctions."²¹ The words of Christ are general, "whatsoever you shall bind," "whatsoever you shall loose." Hence they include whatever may be necessary or even useful

¹⁸ Crnica, *Modifikationen in Tractatu de Censuris*, p. 70.

¹⁹ *Ibidem*.

²⁰ Matt. XVIII, 18.

²¹ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V, 678.

for the proper government of the Church. Nor is there any reason for limiting the meaning of the words, which Christ Himself did not limit.²²

Moreover, Christ explicitly granted to the Church the right to excommunicate. Speaking of an offender who remains contumacious even after being warned in the presence of two witnesses, Christ says: "And if he will not hear thee, tell the church. And if he will not hear the church, let him be to thee as the heathen and the publican."²³ The word *church* evidently has reference to the rulers and pastors of the Church. It is true that some have understood the word to mean the pastor together with the faithful among whom the offender resides. Indeed, in the primitive Church, scandalous sinners were sometimes denounced to all the faithful of the place, and if they remained obstinate, the bishop pronounced sentence of excommunication against them in the presence of the faithful.²⁴ Gradually, however, it came to pass that the sinner was denounced only to the bishop who alone, from the beginning, possessed the power to impose such penalties.²⁵

There are four reasons which support the opinion that the word *church* in the above-mentioned text refers only to the pastors and prelates of the Church. In the first place, Christ ordered the Church to be heard, that is, obeyed: but such obedience is due only to the pastors of the Church. Secondly, the words which follow the text under discussion "whatsoever you shall bind," etc., most certainly refer only to the Apostles and their successors. Thirdly, although the method mentioned in the preceding paragraph was employed at times in the cases of scandalous and public sinners, the universal custom of the Church has always been to refer such matters to the legitimate ecclesiastical superiors. Finally, it would seem that Christ, in the text under consideration, had

²² Suarez, *De Censuris*, disp. I, s. 2, n. 3.

²³ Matt. XVIII.

²⁴ Ex. gr., I Cor. V.

²⁵ MacEvilly, *An Exposition of the Gospels (Matthew & Mark)*, p. 328.

reference to a private and occult crime, hence it would be against charity and a grave injustice to denounce the offender publicly.²⁶

If the offender refused to obey the legitimate authorities of the Church, he was to be as the heathen and publican, that is, he was to be considered and treated as the Jews considered and treated the heathens and publicans. The Jews entirely refrained from communicating with the heathens and they regarded as infamous the publicans because of their injustice and oppression of the poor.²⁷

2. *The Church Has Exercised this Right from the Beginning*

The right to excommunicate, inherent in the Church as in every properly constituted society, and explicitly granted to the Church by Christ Himself, was exercised from the very beginning of the Christian era. Saint Paul evidently excommunicated Hymeneus and Alexander, who had rejected faith and a good conscience,²⁸ and if he did not himself actually excommunicate the incestuous Corinthian, he judged the Corinthian to be worthy of excommunication and directed the Corinthian pastors "in the name of our Lord Jesus Christ" and "with the power of our Lord Jesus Christ to deliver such a one to Satan for the destruction of the flesh, that the spirit may be saved in the day of our Lord Jesus Christ."²⁹ In both cases, the Apostle speaks of delivering the delinquents to Satan. This is evidently effected by expelling them from the Church, for by being driven out of the Church, they "were placed in the kingdom of Satan since his is the other kingdom that is arrayed against the Church, the Kingdom of God."³⁰ "Omnis Christianus, dilect-

²⁶ *The Great Commentary of Cornelius a Lapide*, translated by T. W. Mossman, St. Matthew, chap. X-XXI, pp. 303-305. MacEvilly, *An Exposition of the Gospels, (Matthew & Mark)*, p. 328.

²⁷ MacEvilly, *An Exposition of the Gospels, (Matthew & Mark)*, p. 328.

²⁸ I Tim. I, 20.

²⁹ I Cor. V.

³⁰ MacEvilly, *An Exposition of the Epistles of Saint Paul, etc.*, Vol. II, p. 90.

issimi," writes Saint Augustine, "qui a sacerdotibus excommunicatur, satanae traditur: * * * quia extra ecclesiam est diabolus, sicut in ecclesia Christus, ac per hoc quasi diabolo traditur qui ab ecclesiastica communione removetur. Unde illos, quos tunc Apostolus satanae traditos predicat excommunicatos a se esse demonstrat."³¹ It is to be noted that in both cases the object of the punishment is to secure the emendation of the offender: "that they may learn not to blaspheme"; "that the spirit may be saved in the day of our Lord Jesus Christ."

In the Epistles of Saint Paul there are references to the practice of regarding a person as anathema. Thus the Apostle invoked the anathema against those who love not our Lord Jesus Christ, and against anyone, angel or man, who preached a doctrine different from that which he preached.³²

The faithful are frequently warned by the Apostles to avoid the company of sinful brethren.³³ Such warnings doubtlessly have reference to persons who, if not formally excommunicated, were practically at least regarded as such. If the faithful were not allowed to associate with them even in civil and profane affairs, may it reasonably be supposed that the Apostles placed no restrictions on the presence of such sinners at the Eucharistic sacrifice and the public assemblies of the faithful?

It is clear from the Epistles, therefore, that the penalty of excommunication was in use during the lifetime of the Apostles and that it was employed principally for corrective and protective rather than punitive purposes. In the pastoral Epistles,³⁴ it is apparent that even in the lifetime of the Apostles there was gradually developing a formal and recognized mode of proceeding in ecclesiastical disciplinary matters.³⁵

³¹ C. 32, C. XI, q. 3.

³² I Cor. XVI, 17; Tit. III, 10; Rom. IX, 3.

³³ Rom. XVI, 17; Tit. III, 10; I Cor. V. 9ff.; II John, 10-11.

³⁴ I Tim. V. 19-20; Tit. III, 20.

³⁵ *Encyclopædia Britannica*, Vol. X, art., "Excommunication."

The example of the Apostles in this matter was followed by Popes, Councils and Bishops in all ages. The penalty of excommunication was inflicted not only on private individuals who were guilty of serious offenses and who refused obstinately to repent, but also on Emperors, Kings and Princes who were in like manner guilty.³⁶ It would be useless to consume time and space confirming this statement. It is proven from almost countless documents. What is more, it is practically admitted by all. What is of more importance is to determine how many species of excommunication have existed in the discipline of the Church. Before proceeding to this question, it might be well to say a few words concerning the terminology used by the Church in connection with this penalty.

3. Terminology

The penal terminology of the Church was, of course, a gradual development. It must not be supposed that total separation from the communion of the Church has always been expressed by the term *excommunication*. On the contrary, many and varied were the expressions used to designate this penalty,³⁷ ex. gr., *ab ecclesia haberi extraneus*; ³⁸ *de ecclesiae communione pelli*; ³⁹ *separare ab ecclesia*; ⁴⁰ *a communione orationis et conventus et omnis sancti commercii relegari*; ⁴¹ *segregare ab ecclesiae corpore*; ⁴² *anathematizare*; ⁴³ *ἐκβαλλειν ἐκκλησίας*⁴⁴; ἀποβάλλεσθαι τῆς ἐκκλησίας.⁴⁵

³⁶ Cf. *Disputationes Marti Alterii, De Censuris Ecclesiasticis*, tom. I, lib. I, disp. III, cap. 3.

³⁷ Ornica, *Modificationes in Tractatu de Censuris*, p. 71.

³⁸ C. of Elvira (306) c. 41, Mansi 2, 12; C. of Agde (506) c. 42, Mansi 8, 332.

³⁹ C. of Agde, (506) c. 8, Mansi 8, 332.

⁴⁰ C. of Sargossa (601) c. 5, Mansi 3, 635.

⁴¹ Tertullian, *Apologetic.*, c. 39, MPL, 1, 469.

⁴² C. 32, D. 50; C. 2, C. XV, q. 5; C. of Lerida (524) c. 5, Mansi 8, 613.

⁴³ C. of Sargossa, c. 1-4, Mansi 3, 634ss.; II C. of Carthage (390) c. 8, Mansi 3, 695.

⁴⁴ C. of Sardica, (343) c. 14, Mansi 3, 17; c. 4, C. XI, q. 3.

⁴⁵ Can. Apost., 51, 62.

On the other hand, it would be equally wrong always to understand the term *excommunicate* or *excommunication* as found in documents even as late as the twelfth century in the sense of total exclusion from the Christian community. At first *excommunication* was a generic term used to designate all ecclesiastical punishments and remedies. Thus it was employed sometimes to designate exclusion from the communion of the faithful, sometimes to signify merely the privation of some right or rights belonging to the faithful, or to a certain class among them. Then, as now, there were in the Church certain rights which were common to all the faithful, ex. gr., the reception of the sacraments, presence at Holy Mass and public prayers; there were other rights which were proper to the various grades among the clergy. Whoever, therefore, was deprived of all these rights, or of one or a number of them, might be designated by the general term *excommunicated*, that is, placed outside the communion to which his position in the Christian society entitled him.⁴⁶

“When in the middle of the ninth century, the forum *externum* and the forum *sacramentale* had become more distinctly separated, the distinction was more clearly made also between penances and punishments which pertained to the external order. But for some time yet, the term *excommunication* continued to be applied to various kinds of punishments. It was only in the twelfth and thirteenth centuries that its technical meaning became definitely fixed, and the term employed to designate exclusively one of the three penalties which were thereafter distinguished from all others by the name of censures.”⁴⁷

4. Mortal Excommunication

In treating of the discipline of the early Church, authors usually make mention of two species of excommuni-

⁴⁶ Berardi, *Commentarium in Jus Ecclesiasticum*, II, pt. II, diss. 3, cap. 5.

⁴⁷ Ayrinhac, *Penal Legislation in the New Code*, p. 116.

cation, namely, mortal excommunication and medicinal excommunication.⁴⁸

Mortal excommunication (*πανελης ἀφορισμός, omnimoda separatio*) was inflicted upon persons who were guilty of very serious offences and who refused contumaciously to repent. Persons under ban of this penalty were entirely deprived of communion with the Church, and hence were excluded not only from a participation in the Eucharist, but also from the prayers of the faithful and from hearing the Scriptures in any ecclesiastical assembly.⁴⁹ Four points may be mentioned concerning mortal excommunication.⁵⁰ 1) It was compared to the expulsion of Adam from Paradise.⁵¹ 2) Usually when one fell under this censure, the neighboring churches, and sometimes all the churches of the Christian world, were notified by letter of the fact, that they might ratify the sentence and refuse to admit the excommunicate to their communion.⁵² 3) A person excommunicated by one church was held to be excommunicated by all the churches: no other bishop or church could receive him.⁵³ Sometimes the same penalty was incurred by anyone who admitted an excommunicate to public or even private communion.⁵⁴ 4) All under ban of mortal excommunication were denied communication even in the civil and social affairs of daily life.⁵⁵

Mortal excommunication has existed from the beginning of Christianity. Prescinding from the extraordinary effects which the *delivering to Satan* may have had in Apostolic times, it was undoubtedly this punishment which was imposed upon the incestuous Corinthian and

⁴⁸ Devoti, *Lib. IV Institutionum Canoniarum*, tom. IV, tit. XVIII, § IV; Bingham, *Antiquities*, bk. XVI, ii, 8.

⁴⁹ Devoti, *loc. cit.*

⁵⁰ Bingham, *loc. cit.*

⁵¹ Cf. *supra*, p. 4.

⁵² Socrates, *Historia Ecclesiastica*, L. 1, c. 6, MPG, 67, 42, 43; Theodoret, *Historia Ecclesiastica*, L. 1, c. 4, MPG, 82, 910-911.

⁵³ Can. Apost., 13, 32; C. of Nice (325) c. 5, Mansi 2, 670; C. of Sardica (343) c. 13, Mansi 3, 15.

⁵⁴ Can. Apost., 13; II C. of Carthage (390) c. 7, Mansi 3, 694.

⁵⁵ Cf. Chap. III.

upon Hymeneus and Alexander. Mortal excommunication and anathema were essentially the same penalty. Later mortal excommunication became known as major excommunication to distinguish it from minor excommunication, although long before the abolition of the latter, it was decreed that the word *excommunication* used without any modification was to designate major excommunication.⁵⁶

5. *The Delivering to Satan*

Almost all commentators agree that the phrase *to deliver to Satan* designates at the very least the dread sentence of excommunication, especially when such a penalty is imposed nominally and publicly. Certainly one who is cut off from communion with the Church can be said to be delivered to Satan in this sense, that, deprived of so many means of grace, he is more exposed to and more easily conquered by the tyranny and incursions of Satan.⁵⁷ Again, such an expression may have reference to the corporal afflictions which one would have to endure by reason of being deprived of all communication, sacred and profane, with the faithful.⁵⁸

Many commentators, however, are of the opinion that in Apostolic times the delivering to Satan implied much more than the spiritual punishment of excommunication. They maintain that persons thus punished were handed over to Satan in much the same way as Job, and consequently were subject to corporal vexations and torments inflicted by the evil one. This opinion has the support of Saint John Chrysostom⁵⁹ and of most of the Greek Fathers, and among the Latin Fathers of Saints Pacianus,⁶⁰ Ambrose⁶¹ and Augustine.⁶² Certainly corporal

⁵⁶ C. 59, X, *de sententia excommunicationis*, V. 39.

⁵⁷ Estius, *In Omnes Pauli Epistolas, itemque in Catholicas Commentarii*, II, 205.

⁵⁸ MacEvilly, *An Exposition of the Epistles of St. Paul*, I, 174.

⁵⁹ *Hom. 15, in I Cor.*, MPG 61, 123.

⁶⁰ *Epis. 3 ad Sempr.*, MPL 13, 1075.

⁶¹ *De Poenitentia*, Lib. 1, c. 18, MPL 16, 484-485.

⁶² *De Sermone Domini in Monte*, lib. 1, c. 20, MPL 34, 1263.

afflictions and torments were effects of sin not uncommon in the early ages.

The ancient canons very seldom used the phrase under discussion. Saint Basil mentioned it once.⁶³ In the Decree of Gratian there is an epistle of Pope Pelagius which reads as follows: "Apostolicae auctoritatis exemplo didicimus, errantium et in errorem mittentium spiritus tradendos esse Satanae, ut blasphemare dediscant."⁶⁴ The phrase in these passages, however, seems to imply no more than the spiritual delivering over to Satan, that is, expulsion from communion with the Church, or excommunication, without any reference to bodily afflictions.

6. *Anathema*

Anathema (from Gr. ἀνάθεμα or ἀνάθημα : Lat. *anathēma* or *anathēma*) literally signifies "set apart," "placed on high." The classical Greek form ἀνάθημα (Lat. *anathēma*) was the technical term used to designate a gift or offering made to a god in reparation for an offence, in thanksgiving for a favor, or with a view to propitiation.⁶⁵ Usually such gifts or offerings were suspended from the walls of the temple that they might be seen by all. "As odious objects were also exposed to view, e. g., the head of a criminal or of an enemy, or his arms or spoils, the word *anathema* came to signify a thing hated or execrable, devoted to public abhorrence or destruction."⁶⁶

In the form ἀνάθεμα (Lat. *anathēma*), the word is employed in Sacred Scripture as the equivalent of the Hebrew *herem*. "To understand the word *anathema*," says Vigouroux, "we should first go back to the real meaning of *herem*, of which it is the equivalent. *Herem* comes from the word *haram*, to cut off, to separate, to curse, and indicates that which is cursed and condemned to be cut off or exterminated, whether a person or a

⁶³ *Epis. CLXXXIII*, c. 7, MPG 32, 675.

⁶⁴ C. 13, C. XXIV, q. 3.

⁶⁵ *Encyclopædia Britannica*, Vol. I, art., "Anathema."

⁶⁶ Gignac, "Anathema," *Catholic Encyclopædia*, I, 455.

thing, and consequently that which man is forbidden to make use of.”⁶⁷ In Arabic the root h-r-m signifies simply “to set apart,” “to separate.” Hence the idea of destruction is a secondary meaning of the word which gradually lost its primitive signification of gift, offering.⁶⁸ However, the word occurs a few times in Sacred Scripture in its primary sense.⁶⁹

In the Old Testament, “nations, individuals, animals and inanimate objects may become anathema, i. e., cursed and devoted to destruction. * * * When a people was anathematized by the Lord, they were to be entirely exterminated. Saul was rejected by God for having spared Agag, King of the Amalecites, and the greater portion of the booty (I K. xv, 9-23). Anyone who spared anything belonging to a man who had been declared anathema, became himself anathema. * * * Sometimes it is cities that are anathematized. When the anathema is rigorous all the inhabitants are to be exterminated, the city burned, and permission denied ever to rebuild it, and its riches offered to Jehovah. This was the fate of Jericho (Jos., vi, 17). If it is less strict, all the inhabitants are to be put to death, but the herds may be divided among the victors (Jos., viii, 27). The obligation of killing all inhabitants occasionally admits of exceptions in the case of young girls who remain captives in the hands of the conquerors (Num., xxxi, 18). The severity of the anathema in the Old Testament is explained by the necessity there was of preserving the Jewish people and protecting them against the idolatry professed by the neighbouring pagans.”⁷⁰

In the New Testament, anathema designates separation from God, or from the society of the faithful.⁷¹ But he who is separated from God is cursed, hence the word is also employed as a malediction.⁷² At an early date,

⁶⁷ *Dictionnaire de la Bible* I, 545, (translated in *Cath. Ency.*, I, 455).

⁶⁸ *Encyclopedia Britannica*, Vol. 1, art., “Anathema.”

⁶⁹ Judith XVI, 23; II Mach. IX, 16; Luke XXI, 15.

⁷⁰ Gignac, “Anathema,” *Catholic Encyclopedia*, I, 455.

⁷¹ Rom. IX, 3; Gal. I, 9.

⁷² I. Cor. XVI, 22.

the Church adopted the word into its penal terminology to signify the total exclusion of one from the Christian community. Generally, however, it was employed to designate the excommunication incurred for heresy. All the councils from Nice to that of the Vatican have worded their dogmatic canons: "If any one say * * * let him be anathema."⁷³

At first the anathema, as pronounced against persons, did not differ from the sentence of excommunication. It would seem, however, that a distinction arose between them sometime in the sixth century and continued until the time of Pope Gregory IX. Thus a canon of the Council of Tours speaks of a usurper of church goods dying "not only excommunicated, but anathematized."⁷⁴ In the Decree of Gratian we read: "Know that Engeltrude is not only under ban of excommunication, which separates her from the society of the brethren, but under the anathema which separates from the body of Christ, which is the Church."⁷⁵ Most canonists seem to be of the opinion that there was never an essential distinction between anathema and excommunication. They attribute the seeming difference between them during the period mentioned above to the fact that before the time of Gregory IX, the word *anathema*, when used in opposition to *excommunication*, designated major excommunication, while the term *excommunication*, used in opposition to *anathema*, signified minor excommunication.⁷⁶ Since Gregory IX declared that the term *excommunication*, used without any modification, was to be understood as major excommunication,⁷⁷ there has been no difference between the latter and anathema, except a greater or less solemnity in pronouncing the sentence.⁷⁸ It is this distinction which is recognized and retained by the Code,

⁷³ Gignac, "Anathema," *Catholic Encyclopedia*, I, 456.

⁷⁴ Can. 24, *Mansi* 9, 803-804.

⁷⁵ C. 13, C. III, q. 4 (translated in the *Catholic Encyclopedia*, I, 456).

⁷⁶ Cf. Suarez, *De Censuris*, disp. VIII, s. 2, n. 4-9; Wernz, VI, n. 179; Augustine, *Commentary*, VIII, p. 169.

⁷⁷ C. 59, X, *de sententia excommunicationis*, V. 39.

⁷⁸ Gignac, "Anathema," *Catholic Encyclopedia*, I, 456.

which informs us that excommunication is likewise called anathema, especially when it is inflicted with the solemnities described in the Roman Pontifical.⁷⁹

7. *Maranatha*

In the first Epistle to the Corinthians, Saint Paul writes: "If any man love not our Lord Jesus Christ, let him be anathema, maranatha."⁸⁰ There has been quite a discussion as to the proper signification of the word *maranatha*.⁸¹ Saint John Chrysostom says that it is a Hebrew word, signifying "*Dominus noster venit.*" He uses it to reprove those who continue in sin despite the fact that the Lord had come among them.⁸² Saint Jerome understands the word in the same sense, although he claims that it is more a Syriac than a Hebrew term. He employs it against those who denied that the Lord had come among them.⁸³ Understood in this sense, *maranatha* added nothing to the penalty of excommunication, but was only a reason for pronouncing such a sentence against those who denied the coming of Christ either in word, as the Jew, or by disgraceful lives, as in the case of bad Christians.⁸⁴ Saint Augustine asserts that *maranatha* is a Syriac word, signifying "*Donec Dominus redeat.*"⁸⁵

Whatever the meaning of the word, it was hardly ever used in any ancient form of excommunication. In the few places in which it does occur,⁸⁶ it seems to signify "in the coming of the Lord" or "until the coming of the Lord."⁸⁷ *Maranatha* did not add another punishment to that of excommunication, but merely increased its ex-

⁷⁹ Can. 2257, § 2.

⁸⁰ I Cor. XVI, 22.

⁸¹ *Devoti, Lib. IV Institutionum Canoniarum*, tom. II, tit XVIII, tit. § VII, not. 3.

⁸² *Hom. 44 in I Cor.* n. 3, MPG 61, 377.

⁸³ *Epis. 26 ad Marcellam*, n. 4, MPL 22, 431.

⁸⁴ Bingham, *Antiquities*, bk. XVI, ii, 16.

⁸⁵ *Epis.* 20, n. 15.

⁸⁶ III C. of Toledo, (589) c. 18, Mansi 9, 986; IV C. of Toledo, (633) c. 74, Mansi 10, 639.

⁸⁷ *Encyclopédie de La Théologie Catholique*, "*Maranatha*," XIV, 201.

ternal solemnity. It is not to be understood as rigorously as some have thought, as though it absolutely separated one from the Church without any hope of reconciliation. Such an opinion is certainly most false, as it is opposed to the end of the Church and the divine economy of Redemption.⁸⁸ The "anathema maranatha is a censure from which the criminal may be absolved; although he is delivered to Satan and his angels, the Church, in virtue of the Power of the Keys, can receive him once more into the communion of the faithful. More than this, it is with this purpose in view that she takes such rigorous measures against him, in order that by the mortification of his body, his soul may be saved on the last day. The Church, animated by the spirit of God, does not wish the death of the sinner, but rather that he be converted and live. This explains why the most severe and terrifying formulas of excommunication, containing all the rigors of the maranatha have, as a rule, clauses like this: Unless he becomes repentant, or gives satisfaction, or is corrected."⁸⁹

8. *Medicinal Excommunication*

Medicinal excommunication (*ἀφορισμός*, *separatio*) was inflicted upon those who were guilty of offences of a less serious character and also upon persons who had committed very grave offences but who acknowledged their sins and sought from the Church penance and peace. There seems to have been two grades to this lesser excommunication. Some who were under ban of it were deprived only of a participation in the Eucharist, while others, in addition to this, were excluded from the prayers of the faithful and had to pray with the catechumens.⁹⁰ Theodoret, when speaking of those who had sinned rather through weakness than malice, says that they should be excluded from the holy mysteries, but not

⁸⁸ Cappello, *De Censuris*, n. 140.

⁸⁹ Gignac, "Anathema," *Catholic Encyclopedia*, I, 456.

⁹⁰ Devoti, *Lib. IV Institutionum Canoniarum*, tom. IV, tit. XVIII, § IV; Bingham, *Antiquities*, bk. XVI, ii. 7.

from the prayers of the catechumens. "Arceantur, inquit, a participatione sacrorum mysteriorum, a catechumenorum autem oratione non prohibeantur, neque divinarum scripturarum auditione, neque a magistrorum auditione."⁹¹ A canon of Gregory Thaumaturgus speaks of an excommunication from prayers, which most likely has reference to the prayers of the faithful, and not the prayers of the catechumens, at which excommunicates might assist despite their exclusion from the other.⁹² The Council of Lerida decreed that those who were guilty of certain sins of impurity should be admitted to the church only for the Mass of the catechumens.⁹³

That there was even a lesser degree of excommunication, which excluded one from participation in the Eucharist, seems clear from one of the canons of the Council of Elvira, which reads as follows: "Virgines quae virginitatem suam non custodierint, si eosdem, qui eas violaverint, duxerint et tenuerint (maritos), eo quod solas nuptias violaverint, post annum sine poenitentia reconciliari debebunt."⁹⁴ The phrase "post annum sine poenitentia reconciliari debebunt" must not be understood in the sense that they were not obliged to receive the Sacrament of Penance, but in the sense that they were not obliged to pass through the various stages of public penance. Hence it would seem that their punishment consisted solely in the privation of the Eucharist.⁹⁵ A similar punishment for trigamists is mentioned in the canons of Saint Basil.⁹⁶

9. Medicinal Excommunication and Public Penance

From what has been said, it would seem that medicinal excommunication was very closely allied to the public penitential system, and such was the case. "In the first

⁹¹ *Epis. 77 ad Eulaliu*, MPG, 83, 1250.

⁹² Bingham, *loc. cit.*

⁹³ *Can. 4, Mansi, 8, 613.*

⁹⁴ *Can. 14, Mansi, 2, 8.*

⁹⁵ *Devoti, Lib. IV Institutionum Canoniarum*, tom. IV, tit. XVIII, § IV.

⁹⁶ *Epis. 188, (Canonica prima) c. 4, MPG, 32, 674.*

Christian centuries it is not always easy to distinguish between excommunication and penitential exclusion; to differentiate them satisfactorily we must await the decline of the institution of public penance and the well-defined separation between those things appertaining to the *forum internum*, or tribunal of conscience, and the *forum externum*, or public ecclesiastical tribunal."⁹⁷ Nevertheless, authors assert,⁹⁸ and it is somewhat clear from what has already been said concerning medicinal excommunication, that there was some distinction between them. Indeed, every public penance was a form of medicinal excommunication, but every medicinal excommunication was not a public penance, nor was public penance necessarily connected with the penalty of medicinal excommunication.⁹⁹

Since the various grades of public penance were forms of medicinal excommunication, it will not be out of place to describe them briefly. It is generally agreed that there were four grades of public penitents. How early these distinctions among the penitents came into being is not certain. However, in the third and fourth centuries we commonly find them divided into four classes. The first class was comprised of the *flentes* (weeping) who, dressed in penitential garb, stationed themselves outside the church and besought the prayers of the faithful as they entered the church. The second class comprised the *audientes* (hearers). These were stationed in the narthex of the church, behind the catechumens, and were allowed to remain for the Mass of the catechumens, that is, until the end of the sermon, after which they were dismissed. In the third group were the *substrati* (prostrate), or the *genuflectentes* (kneeling), who occupied the space between the door and the ambo. After the

⁹⁷ Boudinhon, "Excommunication," *Catholic Encyclopedia*, I, 678-679.

⁹⁸ Ex. gr., Devoti, *Lib. IV Instit. Canon.* tom. II, tit. XVIII, § 1V; "Magnus est etiam error illorum, qui medicinalem excommunicationem cum publica poenitentia confundunt, quasi nullum inter unam atque alteram discrimen intercedat."

⁹⁹ *Ibidem*.

dismissal of the *audientes* and the catechumens, the Bishop imposed hands upon the *substrati* and together with the faithful prayed over them. Finally, there were the *consistentes* (standing) who were permitted to assist at all the divine mysteries, but could not make oblations nor receive the Holy Eucharist.

This grouping into stations originated in the East. Whether or not they ever existed in the West is doubtful. Msgr. Duchesne remarks: "The three or four stages of penitential disciple in the East were never observed in the Latin countries. We may even question, if in the East they were of universal observation. The Apostolic Constitutions and Canons do not mention them, neither does the Council of Antioch (341) nor Saint John Chrysostom. In Syria we see, both by the writings of Saint John Chrysostom and Book II of the Apostolic Constitutions, that great lenience was shown towards penitent sinners."¹⁰⁰

The penitential discipline of the Church was most severe in the fourth and fifth centuries, but it was not long before it was mitigated and so modified that the four classes of penitents disappeared, and, except in extremely rare cases, public penance fell into desuetude.

It is rather difficult to ascertain unto what period the two degrees of medicinal excommunication, of which mention was above made, remained in force. However, it should seem that it was from these two grades of medicinal excommunication and the public system of penance, that there developed about the time of the Decretals the censure known as minor excommunication. Before treating of this censure, it might be well to mention here a penal measure affecting bishops (and churches) and frequently called *excommunication*, but which was rather a denial of episcopal communion.¹⁰¹

¹⁰⁰ *Christian Worship: Its Origin and Evolution*, p. 436, note 1.

¹⁰¹ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V, 679.

10. *The Denial of Episcopal Communion*

The denial of episcopal communion was the refusal "by a bishop to communicate *in sacris* with another bishop and his church, in consideration of an act deemed reprehensible and worthy of chastisement."¹⁰²

The various churches of the Christian world were wont in two ways to show their union with the one universal Church established by Christ.¹⁰³ The first way was by exchanging letters of communion. These letters were sent by the bishops to one another, and especially to the Roman Pontiff, as a pledge of faith and unity. There seems to have been a determined formula for such letters, hence they were called *formatae*. Thus Optatus of Milevis, in order to prove that he and his church were in communion with all the Christian churches, says that he communicates with Siricius, the Bishop of Rome, "*cum quo nobiscum totus orbis commercio formatarum in una communionis societate concordat.*"¹⁰⁴

Another pledge of communion was the reception by one church of the faithful and clerics from another church. The faithful were admitted to a participation in the sacred mysteries and the clerics to the exercise of their office in other churches, if they could present letters of recommendation from their bishop.¹⁰⁵

The *litterae formatae* of a bishop who was refused episcopal communion were not accepted by the bishop or bishops who had severed communion; nor did such a bishop or bishops thus communicate with him. The faithful and clerics of his church, although having commendatory letters from him, were not received into the church of the bishop or bishops who had broken off communication with him.

¹⁰² Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 679: cf. Hinschius, *System des Katholischen Kirchenrechts*, vol. 4, p. 742 ff.

¹⁰³ DeSmedt, *Dissertationes Selectae in Primam Aetatem Historiae Ecclesiasticae*, diss. II, cap. III, n. 17.

¹⁰⁴ MPL, 11, 949.

¹⁰⁵ C. 6. 7, 8, 9, D. 71.

In the early Christian times episcopal communion was denied to bishops who were guilty of certain offences of a minor character. This penalty was very frequently employed against bishops who, without a legitimate excuse, failed to attend a provincial council.¹⁰⁶ Thus the fifth Council of Carthage ordered such a bishop "*Ecclēsię suę communione esse contentus.*"¹⁰⁷ A council of Arles (452) decreed: "*Si quis autem adesse neglexerit * * * alienatum se a fratrum communione cognoscat.*"¹⁰⁸ The Synod of Tarragona (516) deprived such a bishop of the communion of charity of the other bishops until the next council.¹⁰⁹

This refusal of episcopal communion was frequently called *excommunication*, for it deprived a bishop of, or placed him outside the communion (*extra communionem*) of other bishops. Of course, it was not excommunication in the present canonical sense of the term. With regard to his church, clergy and faithful, the status of a bishop thus punished was not altered; he was merely denied the consolation of communion with his episcopal brethren;¹¹⁰ he had "to be content with the communion of his own church." Moreover, this measure did not suppose in the bishop who severed communion any authority over the other. Even the faithful have at times separated themselves from the communion of their pastors, and bishops from the communion of their primates, because of a deviation in faith or discipline.¹¹¹

11. Minor Excommunication

Minor excommunication may be defined as a censure which deprived one of the passive use of the sacraments, that is, of their reception. It was called minor, not because it was in itself a slight penalty; to be deprived

¹⁰⁶ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 679-680.

¹⁰⁷ C. 10, D. 18.

¹⁰⁸ Can. 19, *Mansi*, 7, 880.

¹⁰⁹ Can. 6, *Mansi*, 8, 542.

¹¹⁰ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 680.

¹¹¹ Cf. DeSmedt, *Dissertationes Selectae in Primam Aetatem Historię Ecclesiasticę*, diss. II, cap. III, n. 20.

of the sacraments is, indeed, a very grave punishment. It was minor, however, in comparison to major excommunication: (1) because it was incurred for offences of a less serious character, and sometimes even for venial sin; (2) because it did not exclude one from as many rights and blessings; (3) because it could be absolved from more easily.¹¹²

Minor excommunication had but one direct effect—the privation of the passive use of the sacraments, that is, of their reception.¹¹³ Theologians commonly taught that one who received a sacrament while under ban of minor excommunication sinned gravely. Sacraments, however, received by such a person were no doubt valid, except perhaps the Sacrament of Penance. Even this would be valid, if no fault was committed in its reception, ex. gr., if the penitent did not know that he was excommunicated, or of the confessor through malice or ignorance did not absolve from the censure.¹¹⁴

There was a controversy whether or not one sinned by administering a sacrament while under ban of minor excommunication. The more common opinion held that such a one did not sin gravely, for Gregory IX, although he asserted that one sins by conferring the sacraments (*peccat autem conferendo*), did not say that he sins gravely (*graviter*), as he did with regard to their reception. Moreover, there was a probable opinion which held that such a one did not sin even venially. Authors who were of this opinion maintained that the words of Gregory IX (*peccat autem conferendo*) referred to cases in which one could not confer a sacrament, without receiving one himself, ex. gr., when a bishop confers Sacred Orders.¹¹⁵

Minor excommunication had another effect, which the authors called indirect, that is, the privation of election

¹¹² Schmalzgrueber, pars IV, tit. XXXIX, n. 211.

¹¹³ C. 10, X, *de clerico excom.* V. 27.

¹¹⁴ Schmalzgrueber, pars IV, tit. XXXIX, n. 198-199; S. Alphonsus, *Theologia Moralis*, VII, n. 148; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 359.

¹¹⁵ S. Alphonsus, *Theologia Moralis*, VII, n. 149; Schmalzgrueber, pars IV, tit. XXXIX, n. 200; Suarez, *De Censuris*, disp. XXIV, s. 2, n. 12.

to a benefice.¹¹⁶ One who is directly deprived of the reception of the sacraments is indirectly forbidden to receive a benefice, because the Church in conferring a benefice usually intends the *beneficiatus* to receive orders and to celebrate Mass.¹¹⁷ Although the text referred only to the reception of a benefice *per electionem*, it was commonly understood to comprise also the reception of a benefice *per collationem* and *praesentationem*, because *collatio* and *praesentatio* are virtually elections, and because the same reason is present in the three cases.¹¹⁸

Minor excommunication was incurred by communicating either *in divinis* or *in humanis*, but *extra crimen criminisum*, with one under ban of major excommunication.¹¹⁹ The *crimen criminisum* was the offence for which excommunication had been incurred. To contract the censure of minor excommunication, the communication, of course, had to be sinful. Hence in cases in which such communication was permissible, the censure was not incurred. However, a sin that was venial *ex levitate materiae* sufficed to bring one under ban of minor excommunication. Doubtlessly the reason for this legislation was to instill into the faithful a great dread of excommunication and to prevent them from communicating too easily with excommunicates. Minor excommunication, however, was not incurred by a sin that was venial *ex imperfecta deliberatione et advertentia*, because in such a case there was no perfectly human act, and consequently that contumacy was lacking which is necessary to contract a censure.¹²⁰

The number of minor excommunications gradually decreased, as the number of excommunicated persons with whom it was forbidden to hold intercourse was reduced. After the Constitution "*Ad vitanda*" of Pope Martin V,

¹¹⁶ C. 10, X, *de clerico excomm.* V. 27.

¹¹⁷ Schmalzgrueber, pars IV, tit. XXXIX, n. 201; S. Alphonsus, *Theologia Moralis*, VII, n. 150.

¹¹⁸ Schmalzgrueber, S. Alphonsus, *loc. cit.*

¹¹⁹ C. 29, X, *de sententia excommunicationis*, V. 39.

¹²⁰ Suarez, *De Censuris*, disp. XXIV, s. 3, n. 3; S. Alphonsus, *Theologia Moralis*, VII, n. 152; Ballerini-Palmieri, *Opus Theologicum Morale* VII, n. 362.

which left but a two-fold class of *vitandi*, it ceased to be of much importance as a disciplinary measure.¹²¹ From that time on little attention was given to it, and it ceased to exist after the Constitution "*Apostolicae Sedis*" had been published.¹²² This Constitution decreed that "*ex quibuscumque censuris, sive excommunicationis, sive suspensionis, sive interdicti, quae per modum latae sententiae, ipsoque facto incurrendae hactenus impositae sunt, nonnisi illae, quas in hac ipsa Constitutione inserimus, eoque modo, quo inserimus, robur exinde habeant.*" As no mention was made in the Constitution of minor excommunication, which was a *latae sententiae* excommunication, canonists came to the conclusion that it was no longer in force. This conclusion was formally confirmed by the Holy Office, December 5, 1883.¹²³

¹²¹ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 680.

¹²² Oct. 12, 1869, (*Fontes*, n. 552).

¹²³ *Fontes*, n. 1084.

CHAPTER III

VITANDI AND TOLERATI: COMMUNICATION IN PROFANE MATTERS

CANONS 2258 AND 2267

CANON 2258:

§ 1. *Excommunicati alii sunt vitandi, alii tolerati.*

§ 2. *Nemo est vitandus, nisi fuerit nominatim a Sede Apostolica excommunicatus, excommunicatio fuerit publice denunciata et in decreto vel sententia expresse dicatur ipsum vitari debere, salvo praescripto can. 2343, § 1, n.1.*

CANON 2267:

Communione in profanis cum excommunicato vitando fideles vitare debent, nisi agatur de conjuge, parentibus, liberis, famulis, subditis, et generatim nisi rationabilis causa excuset.

Excommunicati alii sunt vitandi, alii tolerati.

Canon 2258, § 1, states that some excommunicated persons are to be avoided (*vitandi*), and others are tolerated (*tolerati*).

Originally all persons under ban of major excommunication were to be shunned by the faithful not only in religious affairs, but also in the ordinary and civil affairs of daily life. The Apostles themselves taught the faithful to avoid gravely sinful brethren in all matters. Saint Paul warns the Corinthians "not so much as to eat" with a brother who is a fornicator, or covetous, or a server of idols, or a railer, or a drunkard, or an extortioner.¹ In his epistle to Titus he writes: "A man that

¹ I Cor., V. 10.

is a heretic, after the first and second admonition, avoid."² Saint John, in one of his epistles, writes: "If any man come to you and bring not this doctrine, receive him not into the house, nor say to him, God speed you. For he that saith to him, God speed you, communicateth with his wicked works."³ It would seem that in these cases the Apostles have reference to persons, who, if not formally excommunicated, were practically regarded as such. A fortiori, therefore, must the faithful have been obliged to shun the company of those whom the Apostles found necessary to separate from the communion of the faithful. This same obligation was confirmed by the Fathers,⁴ and repeated by many councils.⁵

Why did the Church forbid intercourse with excommunicates even in profane matters? The following reason is given by Smith:

The end and the aim of the Church in inflicting excommunication is to bring the refractory and obstinate offender back to repentance. Now, it is plain that nothing is a more potent incentive for the sinner to return to obedience than the fact that he is, so to say, an outlaw from society, and that he is completely isolated and cut off from all association and external intercourse with others, even in purely human affairs, namely, in the social and civil relations of every-day life. The faithful are obliged, so to say, to completely disown him and withdraw from his company, as though he were afflicted with a contagious disease, and unworthy to be in the company of his fellowmen. Moreover, the Church wishes to deter others from following the bad ex-

² Tit., III, 10.

³ II John, I, 10; cf., Rom., XVI, 17; II Thess., III, 14.

⁴ Ex. gr., Irenæus, *Contra Hæc.*, l. III, c. 3, MPG, 7, 848 ss.; Basil, *Ep. 69 ad Athanas.*, MPG, 32, 418; Leo M., *Ep. 32 ad Faustum*, MPL, 54, 795.

⁵ C. of Toledo (400), can. 15, 16, 17, Mansi, 3, 1000-1001; C. of Tours (461), can. 8, Mansi, 7, 946; C. of Vannes (465), can. 3, Mansi, 7, 953; C. of Orleans (511), can. 3, Mansi, 8, 351; C. of Lerida (524), can. 4, Mansi, 8, 613.

ample of the excommunicate, by placing before their eyes the gravity of the punishment. Now, nothing could be better calculated to convince the faithful of the dread character of excommunication than the complete isolation of the excommunicate.⁶

Stringent as was this obligation of avoiding excommunicates even in profane matters, it would seem that at first it was not so rigorously enforced that excommunicates were denied the necessities of life, or even those things which were highly useful, or that the faithful could not communicate with them in order to avoid grave danger or inconvenience. Certainly those whose duty it was to care for souls did not neglect the excommunicate: they were not unmindful of the fact that Christ ate with publicans and sinners, and joyfully did they receive back into the fold, as children lost and found, those who were sorry and brought forth fruits worthy of penance.⁷ There seems to have been this distinction between those whom the faithful were obliged to avoid: those whose excommunication was public and notorious were to be shunned publicly and by all; those whose excommunication was not publicly known were to be avoided secretly and, of course, only by those who had knowledge of the censure.⁸ There is a trace of this discipline in the Decretals.⁹

In the course of time the obligation of avoiding excommunicates in profane matters came to be very strictly enforced. This is especially true of the Middle Ages, as is proven from the nature and number of the matters in which the faithful were bound to shun excommunicates and also from the mitigations which the Popes found necessary to make in this matter.

⁶ *Elements of Ecclesiastical Law*, III, n. 3245.

⁷ Schmidt, *Thesaurus Juris Ecclesiastici*, *Disc. de Poenit. et Poenis*, cap. II, n. LXVII; cf. *Apostolic Constitutions*, bk. II, cap. 40.

⁸ Gury-Ballerini, *Compendium Theologiae Moralis*, II, n. 957.

⁹ O. 14, X, *de sent. exco.*, V. 39.

In what particular civil and social affairs were the faithful obliged to shun the company of the excommunicated? These affairs were summed up in the following verse:

*Si pro delictis anathema quis efficiatur,
Os, orare, vale, communio, mensa negatur.*¹⁰

The word *os* included all speech and conversation, whether in private or in public, whether by word of mouth, by writing, or by sign. *Orare* comprised all communication *in divinis*. By the term *vale* was understood all external marks of honor and friendship. Whether the faithful were forbidden to return a salutation was disputed among canonists. Some held that only oral salutations were prohibited and not such as were manifested by signs.¹¹ *Communio* referred to "every kind of daily, civil intercourse, all association in business matters, the making of contracts, the entering into partnership and the like."¹² Finally, by *mensa* was understood all constant association *per modum societatis*.

As has been said, the obligation of avoiding excommunicates even in the civil and social relations of daily life was very rigorously enforced during the Middle Ages: no exception was admitted. A wife was obliged to avoid the company of an excommunicated husband; a husband, an excommunicated wife; children had to avoid parents who were under ban of excommunication, and parents, their excommunicated children; inferiors had to discontinue all intercourse with excommunicated superiors and vice versa. Certainly it was difficult even for persons with the utmost good will to break off all intercourse in some cases.¹³ It is not difficult to understand how such legislation must have been fraught with anxiety for the faithful. This was especially true when such communication became punishable by the censure of minor excommunication.

¹⁰ Cf. c. 17, C. XI, q. 3.

¹¹ Cf. S. Alphonsus, *Theologia Moralis*, VII, n. 192-193.

¹² Smith, *Elements of Ecclesiastical Law*, III, n. 3251.

¹³ Smith, *Elements of Ecclesiastical Law*, III, n. 3246.

Gregory VII was the first to mitigate the law forbidding communication with excommunicated persons. He did so in a council held at Rome in 1079. He made exception in favor of wives, children, servants and subjects of excommunicated persons. He also excused those who were ignorant either of the law forbidding such communication, or of the fact that a person with whom they held intercourse was excommunicated. He admitted necessity and even a certain utility as excusing causes.¹⁴ These exceptions to the general rule were confirmed by Urban II in an epistle to Genebald, the Bishop of Constance, in 1089,¹⁵ and were ratified in the decretals of Gregory IX.¹⁶

The causes excusing one from the obligation of avoiding excommunicates were expressed by canonists in the following verse:

*Utile, lex, humile, res ignorata, necesse,
Haec quinque solvunt anathema, ne possit obesse.*

Utile, that is, utility, either spiritual or temporal, either of the faithful or of the excommunicate. Thus, in the spiritual order, one of the faithful could help an excommunicate by giving salutary advice, by preaching in his presence, and could seek like assistance from an excommunicate if there was no one else who could give it equally well. In the temporal order, the faithful could

¹⁴ "Quoniam multos peccatis nostris exigentibus pro causa excommunicationis perire cotidie cernimus, partim ignorantia, partim nimia simplicitate, partim timore, partim etiam necessitate, devicti misericordia anathematis sententiam ad tempus, prout possumus, temperamus Apostolica itaque auctoritate ab anathematis vinculo hos subtrahimus, videlicet uxores, filios servos, ancillas, seu mancipia, necnon rusticos et servientes, necnon et omnes alios, qui non adeo curiales sunt, ut eorum consilio scelera perpetrentur, et eos, qui ignoranter excommunicatis communicant, sive illos, qui communicant cum illis, qui excommunicatis communicant. Quicumque autem aut orator, sive peregrinus, aut viator in terram excommunicatorum devenerit, ubi non possit emere vel non habeat unde emat, ab excommunicatis accipiendi damus licentiam. Et si quis excommunicatis non in sustentatione superbia, sed humilitatis causa dare aliquid voluerit, non prohibemus." C. 103, C. XI, q. 3.

¹⁵ C. 110, C. XI, q. 3.

¹⁶ C. 31, 43, 53, X, *de sent. exco.*, V. 39.

communicate with those under ban of excommunication for the purpose of giving or receiving alms, of paying or exacting debts.¹⁷ *Lex*, that is, the state of marriage. Hence, a wife could continue conjugal and domestic relations with an excommunicated husband and vice versa. Could a man or woman who had knowingly married an excommunicated person benefit by this exception? The negative opinion was more commonly held, although the affirmative opinion was truly probable.¹⁸ *Humile*, that is, subjection to and dependence upon the one under ban of excommunication. Hence, children, even though emancipated, could freely associate *in humanis* with excommunicated parents; "*pupils and wards* with their excommunicated teachers and guardians; *servants and employees* with their masters and employers; *inferiors* with their superiors; *subjects* with their sovereign or ruler."¹⁹ What has been said concerning children, servants and subjects with regard to their excommunicated parents, masters and rulers was true also of the latter with regard to their excommunicated children, servants and subjects.²⁰ *Res ignorata*, that is, ignorance, either of the law forbidding intercourse with excommunicates or of the fact that the person with whom one held intercourse was excommunicated. Most likely culpable ignorance, so long as it was not affected, was an excusing cause, for Pope Gregory did not qualify the term *ignoranter*.²¹

It was by the Constitution "*Ad vitanda*" of Pope Martin V that the distinction between the *tolerati* and the *vitandi* was really introduced, although the terms *tolerati* and *vitandi* were not employed in the Constitution itself. Despite the mitigations mentioned above, the law prohibiting communication with persons under ban of excommunication was still a source of much scandal and many dangers to the faithful. The offenses

17 Schmalzgrueber, pars IV, tit. XXXIX, n. 183.

18 S. Alphonsus, *Theologia Moralis*, VII, n. 202.

19 Smith, *Elements of Ecclesiastical Law*, III, n. 3256.

20 Schmalzgrueber, pars IV, tit. XXXIX, n. 180.

21 Schmalzgrueber, pars IV, tit. XXXIX, n. 190-191.

which were punished with excommunication had in the course of time multiplied. Consequently, the number of those whom the faithful were obliged to shun even in the social and civil affairs of daily life was excessive, thus making the observance of the law difficult for the faithful in general. Hence, "to avoid scandals and numerous dangers and to relieve timorous consciences," Pope Martin V published the Constitution "*Ad vitanda*" in 1418. The Constitution read as follows:

Ad vitanda scandala et multa pericula, subveniendumque conscientiiis timoratis, omnibus Christi fidelibus tenore praesentium misericorditer indulgemus, quod nemo deinceps a communione alicujus in sacramentorum administratione, vel receptione, aut aliis quibuscumque divinis, vel extra; praetextu cujuscumque sententiae aut censurae ecclesiasticae (*aliter*: seu suspensionis aut prohibitionis) a jure vel ab homine generaliter promulgatae, teneatur abstinere, vel aliquem vitare, ac interdictum ecclesiasticum observare. Nisi sententia vel censura hujusmodi fuerit in vel contra personam, collegium, universitatem, ecclesiam, communitatem, aut locum certum, vel certa, a iudice publicata vel denunciata specialiter et expresse: Constitutionibus Apostolicis et aliis in contrarium facientibus non obstantibus quibuscumque: salvo, si quem pro sacrilegio et manuum injectione in clerum, sententiam latam a canone adeo notorie constiterit incidisse, quod factum non possit aliqua tergiversationi celari, nec aliquo juris suffragio excusari. Nam a communione illius, licet denunciatus non fuerit, volumus abstineri, juxta canonicas sanctiones.²²

²² *Fontes*, n. 45. "Magna controversia inde a tempore *Navarri* excitata est circa genuinum textum Const. *Ad vitanda*. Qui auctor [*Manuale*, c. 27, n. 35] diversam refert lectionem ab ea quae per S. Antoninum [*Summ. histor.*, P. III, tit. 22, c. 6, § 4; *Summ. theol.*, P. III, tit. 25, c. 2 et 3] divulgatur et Concilio Constantiensi attribuitur. Certum est agi de indulto concessa a Martino V in concordatis cum natione germanica initis; de indulto quidem perpetuo et universali ratione destinationis." Cappello, *De Censuris*, n. 142.

By virtue of this Constitution a distinction was made between excommunicated persons. The majority of them the faithful were no longer obliged to shun either *in divinis* or *in humanis*: this class became known as the *tolerati*. There remained but two classes of excommunicated persons whom the faithful were bound to avoid as formerly: these classes became known as the *vitandi*. One class comprised those who had "incurred the penalty of excommunication by reason of sacrilegious violence against a cleric, and so notoriously that the fact can in no way be dissimulated or excused."²³ The other class of *vitandi* was composed of those who had been excommunicated nominally, and whose excommunication had "been published or made known by the judge in special and express form."²⁴

As regards the first class mentioned above, the *notorii percussores clericici*, according to the common opinion, notoriety of law did not suffice to constitute a person a *vitandus*.²⁵ Notoriety of fact was required. But did it suffice? It was probable that notoriety of law was also necessary, for it was required not only that a person strike a cleric, but also that he had incurred the censure, "*ita ut factum non possit celari, nec aliquo suffragio excusari.*" Therefore, until the culprit had confessed or been condemned juridically, he could always be excused for some reason or other, by saying, for example, that he had acted in self-defense, that he was ignorant of the censure, etc. Hence, Saint Alphonsus came to the following conclusion; "*Quare nisi saltem constet facto, quod percussor advertenter voluerit censuram incurrere, probabiliter numquam est vitandus.*"²⁶

Two conditions were required to render other excommunicated persons *vitandi*. The first condition was that

²³ Boudinhon, "Excommunication," *Catholic Encyclopedia*, V. 680.

²⁴ *Ibidem*.

²⁵ Cf. S. Alphonsus, *Theologia Moralis*, VII, n. 142.

²⁶ *Theologia Moralis*, VII, n. 144; cf. Lehmkuhl, *Theologia Moralis*, 12 ed., II, n. 1128; Genicot-Salsmans, *Institutiones Theologiae Moralis*, 7 ed., II, n. 581; Aertnys, *Theologia Moralis*, 3 ed., lib. VII, tract. I, n. 48.

the person had to be excommunicated *nominally*, that is, either by name, or by so otherwise designating him that he could not be confounded with others. The second condition was that he be *publicly denounced* as excommunicated, ex. gr., in a church during Mass or a sermon, on a chart affixed to a public place, or in any other manner according to local custom.²⁷

The legislation of Pope Martin V with regard to the two classes of *vitandi* remained in force until the promulgation of the Code. It is true that some authors taught that after the Constitution "*Apostolicae Sedis*," the *notorii percussores clericorum* were no longer *vitandi*. What gave rise to such an opinion was the fact that no mention was made of such delinquents as *vitandi* in those places in the Constitution in which, according to such authors, mention of it would have been not only opportune, but even necessary (§ II, 2, 16, 17).²⁸ Such an opinion, however, was not sustained by the Holy See. To the question: "Suntne hodie excommunicati vitandi notorii clericorum percussores?" the Sacred Congregation of the Inquisition replied, January 9, 1884: "Affirmative * * * juxta laudatam Bullam *Ad vitanda*."²⁹

The distinction between the *tolerati* and the *vitandi* was introduced in favor of the faithful. It was not the intention of the Church to benefit those under censure. Hence, although the faithful were permitted to communicate with the *tolerati*, the latter were not allowed of their own accord to hold intercourse with the faithful. Of course, the concession granted to the faithful was indirectly extended to the *tolerati* in cases in which communication was begun by one of the faithful. Otherwise the favor given to the faithful would have been useless, since they would often have been obliged, at least *ex*

²⁷ S. Alphonsus, *Theologia Moralis*, VII, n. 137.

²⁸ Vecchiotti, *Institutiones Canonicae*, Vol. II, cap. IV, n. 53; Sabetti, *Compendium Theologiae Moralis*, n. 954; Konings, *Compendium Theologiae Moralis*, n. 1673.

²⁹ *ASS*, XXXI, p. 399.

caritate, to refrain from such communication.³⁰ However, due to daily custom and to changes in human society, which no longer recognized the civil effects of excommunication, the *tolerati* were no longer obliged to abstain from communicating in *humanis* with the faithful. "Demum pro indole hodiernae societatis Christianae, malo fato ethnicis moribus imbutae, sapientissime S. Poenitentiaria decreto diei 5 Julii 1867 statuit, in *humanis* juribus, nempe jure naturali et civili fundatis, *toleratos* hodie non prohiberi a communione, seu et cum ipsis et ipsis cum aliis fidelibus communicare permissum esse." ³¹

With regard to communication in *humanis* with the *vitandi*, the excusing causes contained in the versicle:

Utile, lex, humile, res ignorata, necesse,

Haec quinque solvunt anathema, ne possit obesse.

were still valid. The law, however, was never any further relaxed until the promulgation of the Code. Although the censure of minor excommunication was no longer incurred by communicating unlawfully with the *vitandi*, the prohibition to abstain from communication was still in force.³² It would seem, however, that before the publication of the Code there was a rather common opinion that the law forbidding communication in civil and profane matters with the *vitandi* had fallen into desuetude. Genicot remarks: "Rationes quas antiqui DD. afferebant ut ostenderent in pluribus casibus licere hanc communicationem civilem, hodie tam late patent ut eae vix non pro quolibet adsint. Jam vero lex quae communiter jam servari nequit, censenda est vim suam amisisse, etsi ab aliquo in particulari servari possit." ³³

The Code, however, repeats the law in Canon 2267, which states that the faithful must avoid communication

³⁰ S. Alphonsus, *Theologia Moralis*, VII, n. 139.

³¹ Lega, *De Judiciis Ecclesiasticis*, para. I, n. 139.

³² Cf. S. C. S. Off., August 2, 1893, (*Fontes*, n. 1166).

³³ *Institutiones Theologiae Moralis*, 7 ed., II, n. 585; cf. Lehmkuhl, *Theologiae Moralis*, 12 ed., II, n. 1145; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 411; Smith, *Elements of Ecclesiastical Law*, III, n. 3249.

in profane matters with the *vitandi*, unless there is question of husband or wife, parents, children, servants, subjects, and, in general, unless a reasonable cause excuses.

Nemo est vitandus, nisi fuerit nominatim a Sede Apostolica excommunicatus, excommunicatio fuerit publice denunciata et in decreto vel sententia expresse dicatur ipsum vitari debere, salvo praescripto Can. 2343, § 1, n.1. (Can. 2258, § 2).

In Canon 2258, § 2, the Code lays down the conditions which are required to constitute a person a *vitandus* under the present discipline. The canon states that no one is *vitandus*, unless he has been nominally excommunicated by the Holy See, unless the excommunication has been publicly declared and unless in the decree or sentence of excommunication it is expressly stated that he must be avoided. Hence, four conditions are required to constitute a person a *vitandus*. In the first place, he must be *nominally* excommunicated, that is, he must be excommunicated by name, or, at least, in such a manner that he cannot be confounded with others. Secondly, he must be excommunicated by the Apostolic See. By the term *Apostolic See* in this canon is to be understood not only the Pope, but also the Congregations, Tribunals and Offices through which the Holy Father is wont to transact the business of the universal Church.³⁴ Hence, no authority inferior to the Apostolic See can render a person a *vitandus*: the Holy See alone can do so, and, it may be added, very seldom resorts to such a drastic measure.³⁵ Thirdly, it is required that the excommunication be *publicly declared*. This could be done by publishing it in the *Acta Apostolicae Sedis*, or by affixing notice of it in some public place, in a word, by any means, according to the circumstances of time and place, that will bring the knowledge of the fact to the faithful. Finally, it is necessary that it be expressly stated in the decree or

³⁴ Can. 7.

³⁵ Cappello, *De Censuris*, n. 141; Chelodi, *Jus Poenale*, n. 36.

sentence of excommunication that the excommunicated person must be avoided. All four conditions must concur in one and the same case to constitute a person a *vitandus*; if any one of them be wanting, the excommunicate is not a *vitandus*.

There is one exception to what has just been said. Canon 2258, § 2, after stating the conditions that are required to render a person a *vitandus*, adds, “salvo prae-scripto Can. 2343, § 1, n.1.” According to this canon, one who lays violent hands upon the person of the Roman Pontiff not only contracts a *latae sententiae* excommunication, which is reserved *specialissimo modo* to the Holy See, but he also *ipso jure* becomes a *vitandus*. No declaration or sentence of any kind is required to render such a culprit a *vitandus*; he becomes such by the very commission of the crime. This is the sole case under the present discipline in which one is rendered *ipso facto* a *vitandus*.

Communication with the *Vitandi* in Profane Matters.

Communione in profanis cum excommunicato vitando fideles vitare debent, nisi agatur de conjuge, parentibus, liberis, famulis, subditis, et generatim nisi rationabilis causa excusat. (Can. 2267.)

In Canon 2267, the Code repeats the law which forbids communication in profane matters with the *vitandi*. The faithful are obliged to avoid communication in profane matters with the *vitandi*, unless there is question of husband or wife, parents, children, servants, subjects, and, in general, unless a reasonable cause excuses. Very little comment will have to be made upon this legislation; its evolution has already been seen. The Code, while substantially in agreement with the changes made in the law by Pope Gregory VII and confirmed by subsequent Pontiffs,³⁶ is somewhat more lenient. Under the present discipline, any reasonable cause will permit the faithful to communicate in profane matters with the *vitandi*; a grave cause is not required.

³⁶ *Supra*, p. 39.

It seems to be the common opinion that one who communicates in profane matters with a *vitandus* without a reasonable cause, and outside the cases excepted in law, does not sin gravely, unless there is danger of perversion or scandal, or unless the communication is held out of formal contempt for ecclesiastical authority.³⁷

Those who give any help or favor to a *vitandus* in the delict for which he was excommunicated *ipso facto* incur an excommunication which is reserved *simpliciter* to the Holy See.³⁸

³⁷ Cocchi, *Commentarium*, VIII, n. 89; Cappello, *De Censuris*, n. 161; Blat, *Commentarium V. De Delictis et Poenis*, n. 94; cf. Vermeersch-Creusen, *Epitome*, III, n. 469.

³⁸ Can. 2338, § 2.

PART II.

THE EFFECTS OF EXCOMMUNICATION

Preliminary Remarks

Before proceeding to comment upon the effects of the censure of excommunication, it will be necessary to discuss two points that have a very practical bearing upon the effects of excommunication. The first point to be discussed will be the legislation of Canon 2232, after which an explanation will be given of the distinction between a declaratory and a condemnatory sentence.

I. THE LEGISLATION OF CANON 2232

Canon 2232, § 1, states that a *latae sententiae* penalty, whether medicinal or vindictive, *ipso facto* binds the delinquent who is conscious of the delict in both forums; before a declaratory sentence, however, the delinquent is excused from observing the penalty whenever he cannot observe it without infamy, and no one can exact the observance of the penalty in the external form, unless the delict is notorious.

A *latae sententiae* penalty is one that is attached to a law or precept in such a manner that it is incurred *ipso facto* by violating the law or precept.¹ Consequently, such a penalty, whether medicinal or vindictive, *ipso facto* binds the delinquent who is conscious of the delict in both forums. Since the penalty is incurred by the very commission of the delict, *per se* it takes effect immediately; *per se* the delinquent is obliged immediately upon the commission of the delict to observe the penalty in the external as well as in the internal forum; *per se* the intervention of a superior is not required in order that the penalty have its effect. However, Canon 2232,

¹ Can. 2217, § 1, n. 2.

§ 1, further states that the delinquent is excused from observing the penalty whenever he cannot observe it without loss of reputation, and no one can exact the observance of the penalty in the external forum, unless the delict is notorious. This legislation is enacted in order to safeguard the reputation of the delinquent. *Reus est in possessione*. The law would be unreasonable, if it were to demand that one betray himself and undergo infamy by observing a penalty that was incurred for an occult delict.² In this legislation, "we see the application of the principle that no one is to be punished unless his guilt is certain, and, in the social and public estimate, no guilt is certain unless it either has been so declared by court or is notorious."³

Before a declaratory sentence, no one can exact the observance of the penalty in the external forum, unless the delict is notorious. An exception is made with regard to penalties incurred for notorious delicts, because, as Sole remarks, "in notoriis nulla probatio."⁴ A delict is notorious if it is publicly known, or was committed under such circumstances that it cannot be concealed by any artifice or excused by any subterfuge of law.⁵ Unless the delict is notorious, not even the legitimate superior can exact the observance of the penalty in the external forum. The superior can, however, if he deems it expedient, pronounce a declaratory sentence; furthermore, he must do so, if he is legitimately requested to do so by an interested party, or if the public good demands it.⁶

The provisions of Canon 2232, § 1, must always be kept in mind when there is question of the effects of excommunication. At times explicit reference will be made to this disposition of law. However, *positis ponendis*, it applies to all the effects of excommunication. No one who has incurred a *latae sententiae* penalty is obliged to

² Cappello, *De Censuris*, n. 74; Chelodi, *Jus Poenale*, n. 28.

³ Ayrinhac, *Penal Legislation*, p. 73.

⁴ *De Delictis et Poenis*, n. 129.

⁵ Can. 2197, n. 3.

⁶ Can. 2223, § 4.

observe it, unless at least one of the following conditions is verified: (1) unless a declaratory sentence has been issued; (2) unless the delict is notorious; (3) unless the delinquent can observe the penalty without loss of reputation.⁷

II. DECLARATORY AND CONDEMNATORY SENTENCE

Mention has been made in the preceding discussion to a declaratory sentence. Very often, too, in treating of the effects of excommunication, reference will be made to a declaratory and condemnatory sentence. Hence, it is very important to understand the distinction between them.

A declaratory sentence has place only in *latae sententiae* penalties; it is a sentence which officially proclaims that one has committed a delict and consequently has incurred the penalty attached to the commission of the delict. Since such a sentence has place only in *latae sententiae* penalties, that is, penalties which are incurred *ipso facto* by the commission of the delict, it is clear that it does not inflict or impose a penalty; it merely makes manifest the fact that a penalty has already been incurred.

A declaratory sentence is never necessary in order that a penalty be incurred, for a *latae sententiae* penalty *ipso facto* binds the delinquent who is conscious of the delict in both forums. It is necessary, however, in order that a penalty that has been incurred for a non-notorious delict have its full force. As we have seen, before a declaratory sentence, a delinquent is not bound to observe a penalty whenever he cannot do so without infamy, and no one can exact the observance of the penalty in the external forum, unless the delict is notorious.

Generally, it is left to the prudent judgment of the superior to declare that a *latae sententiae* penalty has been incurred. In two cases, however, the superior must issue such a declaration: (1) when an interested party

⁷ Cappello, *De Censuris*, n. 74.

legitimately requests it; (2) when the common good demands it.⁸ The penalty can be declared by a judicial sentence, or even extra-judicially, if it was inflicted as a particular precept.⁹

Notoriety of delict is by no means equivalent to a declaratory sentence. It is one thing not to be excused from observing a penalty and it is quite another thing to be subject to those most grave canonical effects which follow upon a declaratory sentence.¹⁰

From the very nature of a declaratory sentence, it follows that the penalty takes effect from the moment the delict was perpetrated.¹¹

A condemnatory sentence has place only in *ferendae sententiae* penalties, that is, penalties which require the intervention of a judge or a superior in order that they be incurred.¹² A condemnatory sentence is one in which a judge, or a superior acting in the capacity of judge, imposes a *ferendae sententiae* penalty upon a delinquent for a delict that has been committed and proven.¹³ A condemnatory sentence really inflicts or imposes a penalty; prior to such a sentence, the delinquent was not under the penalty; hence, the penalty takes effect only from the moment in which the sentence was pronounced. Although prior to the condemnatory sentence, the penalty may have been *a jure*, after such a sentence, it is both *a jure* and *ab homine*, but it is considered as *ab homine*, and hence, reserved.¹⁴

The salient points of distinction between a declaratory and a condemnatory sentence may be summed up as follows: (1) a declaratory sentence has place in *latae sententiae* penalties; a condemnatory sentence has place in *ferendae sententiae* penalties: (2) a declaratory sentence does not impose a penalty; it officially proclaims

⁸ Can. 2223, § 4.

⁹ Cappello, *De Censuris*, n. 75; Cocchi, *Commentarium*, VIII, n. 46.

¹⁰ Cappello, *De Censuris*, n. 76.

¹¹ Can. 2232, § 2.

¹² Can. 2217, § 1, n. 2.

¹³ Cerato, *Censurae Vigentes*, n. 8.

¹⁴ Can. 2217, § 1, n. 3.

that a penalty has already been incurred; consequently, the delinquent was under the penalty prior to the sentence: a condemnatory sentence really imposes or inflicts a penalty; prior to the sentence, the delinquent was not under the penalty: (3) from the very nature of a declaratory sentence it follows that the penalty retroacts to the moment when the delict was committed: from the very nature of a condemnatory sentence, it is clear that the penalty has its effect only from the time when the sentence was issued: (4) a declaratory sentence does not cause an *a jure* penalty to become an *ab homine* penalty; hence, the penalty which is declared does not become reserved by reason of the sentence; such a penalty, however, must be removed even in the external forum by a competent superior:¹⁵ a condemnatory sentence causes an *a jure* penalty to be considered as an *ab homine* penalty and hence reserved by reason of the sentence.¹⁶

Very often in the course of the commentary upon the effects of excommunication, reference will be made to excommunicates against whom either a declaratory or condemnatory sentence has been passed as the *tolerati post sententiam*.

¹⁵ Cappello, *De Censuris*, n. 76.

¹⁶ Can. 2217, § 1, n. 3.

CHAPTER I.

ASSISTANCE AT DIVINE OFFICES

CANON 2259.

§ 1. *Excommunicatus quilibet caret jure assistendi divinis officiis, non tamen praedicationi verbi Dei.*

§ 2. *Si passive assistat toleratus, non est necesse ut expellatur; si vitandus, expellendus est, aut, si expelli nequeat, ab officio cessandum, dummodo id fieri possit sine gravi incommodo; ab assistentia vero activa, quae aliquam secumferat participationem in celebrandis divinis officiis, repellatur non solum vitandus, sed etiam quilibet post sententiam declaratoriam vel condemnatoriam aut alioquin notorie excommunicatus.*

Canon 2259 treats of the assistance of excommunicated persons at divine offices. Assistance at divine offices may be either active or passive. It is passive when one participates merely by observing them, by following what is done. It is active when one participates in them by performing some office or duty.¹

By the term *divine offices* are understood the functions of the power of orders which are ordained by the institution of Christ or the Church for divine worship and can be exercised only by clerics.² Among the divine offices may be enumerated the Holy Sacrifice of the Mass, public processions, the recitation of the canonical hours in choir, the blessing of water, ashes, palms, candles, etc., and, a fortiori, consecrations; in fine, all blessings, and

¹ Cf. Cocchi, *Commentarium*, VIII, n. 87; Chelodi, *Jus Poenale*, n. 37.

² Can. 2256, n. 1.

similar ceremonies that are ordained by the institution of Christ or His Church for divine worship and can be exercised, at least as regards licitness, only by some member of the clergy.³ Many popular devotions, however, such as the Rosary, the Stations of the Cross, etc., even though recited under the leadership of a priest, do not constitute divine offices in the sense of our text.⁴

Under the old law, excommunicates were forbidden to assist at divine offices. The constant formula used in the *Corpus Juris Canonici* is "*excommunicatis . . . exclusis.*"⁵ Hence, theologians taught that an excommunicated person who assisted at a notable portion of a divine office sinned gravely, unless he was excused by reason of ignorance or by the necessity of avoiding grave scandal or grave infamy. No distinction was made between the *tolerati* and the *vitandi*. The reason is obvious: until the year 1418, no such distinction existed, and when the distinction was introduced, it was done so, not to favor those under censure, but for the sake of the faithful.

At the time of the Clementine Decretals, it was necessary to expel from the celebration of Mass all excommunicates whose censure was publicly known, or else to discontinue the celebration of Mass. Pope Clement V in the Council of Vienne formulated an excommunication reserved to the Apostolic See against all who presumed to prohibit excommunicates from leaving the celebration of Mass when warned by the celebrant to do so, and also against all public excommunicates who presumed to remain for Mass when warned nominally by the celebrant to withdraw.⁶

³ Suarez, *De Censuris*, disp. XII, s. 1 et 2; Schmalzgrueber, para IV, tit. XXXIX, n. 130ss.; Cappello, *De Censuris*, n. 149; Sole, *De Delictis et Poenis*, n. 202; Blat, *Commentarium*, V, *De Delictis et Poenis*, n. 81.

⁴ Augustine, *Commentary*, VIII, p. 177.

⁵ Cf. c. 57, X, *de sententia excommunicationis*, V. 39; c. 17, X, *de verborum significatione*, V. 40.

⁶ C. 2, *de sententia excommunicationis*, V. 10 in Clem.

In 1418, the Constitution "*Ad Vitanda*" of Pope Martin V introduced the distinction between the *tolerati* and the *vitandi*. By virtue of this Constitution, the faithful were no longer obliged to abstain from communication either *in sacris* or *in humanis* with those excommunicates who became known as *tolerati*. Since the publication of this Constitution, it has not been obligatory, at least, to avoid communicating *in sacris*, to expel any *toleratus* from divine services. Yet it is difficult to determine when the practice of expelling publicly known *tolerati* really ceased. It is certain that the prohibition for all excommunicates to remain away from divine offices was still in force and for a very long time after Pope Martin V, the violation of this prohibition, even by a *toleratus*, was regarded as a serious matter.

In the course of time, however, the force of the prohibition with regard to the *tolerati* was mitigated, not by law, it is true, but by custom. D'Annibale writes: " * * * nam tolerati (timidus dico, forte omnium primus) aut nullatenus, aut leviter peccant, si intersint divinis officiis, licet usque ad finem intersint. Etenim, cum vix reperies confessarium, qui hodie excommunicatum, his prohibeat; vel excommunicatum, qui sibi his abstinendum ducat, rigor juris hac in re obsolevisse videtur."⁷ Bucceroni was of the opinion that the law did not apply in its full rigor to the *tolerati*. "Licet eadem sit lex pro vitandis et toleratis, ad hos tamen quod spectat, cum hodie vix adsit confessarius, qui excommunicatum arceat a divinis officiis, et nullus sit excommunicatus qui existimet a divinis officiis sibi esse abstinendum, rigor juris hac in re temperatus seu obsolevisse videtur."⁸ Cardinal Lega wrote as follows: "Verum, ut advertit D'Annibale (I, 362, not.19) et confirmat Lehmkuhl (II, 891) hodie *toleratis* videtur permitti ut divinis intersint officiis; imo quasi hoc in votis est catholicorum, ut acatholici et mali catholici videant suis oculis sacras

⁷ *Summula Theologiae Moralis*, I, n: 362, not. 19.

⁸ *Commentarium de Censuris*, n. 99.

functiones cultus catholici et in eum, rituum sanctitate, alliciantur.”⁹ Lehmkühl, in the edition of his *Theologia Moralis*, published in 1884, wrote: “* * * illa assistentia quoad divina officia pro toleratis non videtur hodie amplius vere prohibita.”¹⁰ In the latest edition of his work, published in 1914, his opinion is somewhat stricter: “* * * illa assistentia quoad divina officia pro toleratis non videtur hodie amplius tam severe prohibita.”¹¹ Ballerini-Palmieri embraced the above-mentioned opinion of D’Annibale.¹² Genicot characterized the opinion of D’Annibale, etc., as probable, stating that “nullus episcopus increpat catholicos excommunicatos, ex. gr. Massones, qui Sacro interesse solent; immo Ecclesia heterodoxos potius allicit ad officia sua frequentanda quam eos ab iisdem removet, cum hac frequentatione crebro ad conversionem adducantur.”¹³ The opinion of these authors is given at length in order to show the change that was taking place in attitude toward the *tolerati*. It will serve, too, as a guide to the interpretation of the present discipline as found in the Code.

Excommunicatus quilibet caret jure assistendi divinis officiis, non tamen praedicationi verbi Dei.

Canon 2259, § 1, states that excommunicates are without the right to assist at divine offices. No distinction is made between active and passive assistance, nor between the *vitandi* and the *tolerati*; in fact, the latter distinction is excluded by the term *quilibet*. Hence, we must conclude that all excommunicates, whether *vitandi* or *tolerati* are without the right to assist either actively or passively at divine offices.

Formerly, all excommunicates were forbidden to assist at divine offices; theologians interpreted this prohibition as binding under pain of grave sin. During the last century, however, a milder view was taken by some

⁹ *De Juriis Ecclesiasticis*, III, n. 139.

¹⁰ 5 ed., II, n. 891.

¹¹ 12 ed., II, n. 1136.

¹² *Opus Theologicum Morale*, VII, n. 397.

¹³ *Institutiones Theologiae Moralis*, 7 ed., n. 583.

authors with regard to passive assistance on the part of the *tolerati*. As we have seen, this more benign opinion was proposed by D'Annibale and sponsored by such authors as Bucceroni, Lega, Lehmkuhl, Ballerini-Palmieri and Genicot. This opinion, embraced as it was by such eminent canonists and moralist, has naturally led to some difficulty in interpreting the words *caret jure* of Canon 2259, § 1. Does the phrase *caret jure* mean that excommunicates are forbidden to assist at divine offices, or does it mean that they are merely deprived of the right to do so? It seems certain that the faithful have a right to assist passively at divine offices, at least in their parish churches.¹⁴

Chelodi,¹⁵ Cappello,¹⁶ Noldin-Schönegger¹⁷ and Aertnys-Damen,¹⁸ are of the opinion that Canon 2259, § 1, forbids excommunicates to assist at divine offices. Noldin-Schönegger and Aertnys-Damen maintain that excommunicates are forbidden *sub gravi* to assist at a notable portion of a divine office, unless they are excused by the necessity of avoiding grave scandal or other grave inconveniences.

Blat states that since no mention is made in § 1 of the prohibition which formerly existed, it seems to have been done away with (it remains, he adds, insofar as it is implied in the subsequent paragraph).¹⁹ Vermeersch-Creusen are of the opinion that excommunicates (i. e., *tolerati*) are deprived of the right to assist at divine office, but that they are not forbidden to do so.²⁰ Ayrinhac writes: "He [the excommunicate] has no right to assist; it is not said that he is positively forbidden to do so. The

¹⁴ Wernz-Vidal, *Jus Canonium*, II, n. 736; Can. 467; 1161; 1188, § 2, n. 1.

¹⁵ *Jus Poenale*, n. 37.

¹⁶ *De Censuris*, n. 149.

¹⁷ *De Censuris*, n. 39.

¹⁸ *Theologia Moralis*, 10 ed., II, n. 1002.

¹⁹ " * * * propter omissionem videretur sublata prohibitio, sed remanet ad normam juris praecedentis, quatenus implicita in § ° sequenti," *Commentarium*, V, *De Delictis et Poenis*, n. 86.

²⁰ "Excommunicatus [toleratus] privatur jure assistendi divinis officiis; assistere non prohibetur * * *." *Epitome*, III, n. 461.

prohibition which used to exist is not renewed, at least not explicitly.’²¹

Some authors have not committed themselves explicitly on this question. Sole, in interpreting § 1 of Canon 2259 does not depart from the phraseology of the Code; he employs the phrase *carere jure*.²² In interpreting § 2 of the same canon with regard to passive assistance on the part of the *tolerati*, he explains that legislation by referring to the above-mentioned opinion of Bucceroni, D’Annibale and Cardinal Lega. He quotes these authors verbatim, and he italicizes the words of Cardinal Lega, “*hodie toleratis videtur permitti ut divinis intersint officiis.*” He concludes his commentary on § 2 by writing: “*Et ita facile intelliguntur ea quae habentur de assistentia passiva in § 2 hujus can.; quod scilicet — si passive assistat toleratus, non est necesse ut expellatur; si vitandus, expellendus est.*”²³ Cerato does not commit himself explicitly. However, he does seem to lay special emphasis on the use of the word *jus*, which he places in italics.²⁴ It is rather difficult to ascertain Cocchi’s view-point in this matter. After seeming to favor the prohibitory interpretation, he quotes verbatim the above-mentioned opinion of Vermeersch-Creusen. It may be added, too, that he misinterprets the words of Vermeersch-Creusen, who do not state that excommunicates (i. e., the *tolerati*) are forbidden to assist at divine offices.²⁵ Pruemmer is another author who lays particular stress on the use of the word *jus*. He writes: “*Juxta vigentem Ecclesiae praxim excommunicati tolerati (omnes haeretici) carent quidem jure assistendi divinis officiis . . . sed jam amplius non stricte arcentur a divinis officiis liturgicis.*”²⁶

Following the principle *odiosa restringenda* and Canon 2219, which states that in penalties the more benign in-

²¹ *Penal Legislation*, p. 121.

²² *De Delictis et Poenis*, n. 212.

²³ *Ibidem*, n. 213.

²⁴ *Censurae Vigentes*, n. 37.

²⁵ *Commentarium*, VIII, n. 87.

²⁶ *Manuale Theologiae Moralís*, III, 501.

terpretation is to be made, it would seem that § 1 of Canon 2259 merely deprives excommunicates of the right to assist at divine offices and does not forbid them to do so. The very words of the Code seem to favor this interpretation. The phrase *caret jure* does not necessarily, or even at first sight, imply a prohibition. To say that a person is without the right to place a certain act is by no means equivalent to saying that he is forbidden to place that act. A right is a "moral power, vested in a person, owing to which the holder of the power may claim something as due to him, or as already belonging to him, or demand of others that they should perform some acts or abstain from them."²⁷ To a right in one person there is a corresponding obligation on the part of others, at least to do nothing that will prevent the exercise of that right. A right must be carefully distinguished from mere license to perform an act.²⁸ Daily life furnishes many proofs of the fact that we are allowed to perform many acts for which we can claim no right in the strict sense of the term. The faithful have a *right* to assist (passively) at divine offices. The very nature of the censure of excommunication demands that persons under its ban should be deprived of this right. Canon 2259, § 1, implies that excommunicates are deprived of this right, since it says that they are without it. However, it cannot be proven solely from § 1 of Canon 2259 that they are forbidden to assist at divine offices. Just as one may place certain acts for which he can claim no right in the strict sense of the term, so one may be deprived of a right to do certain things without being forbidden to do those things.

Were it the mind of the legislator to forbid excommunicates in general to assist at divine offices, it is difficult to understand why the phrase *caret jure* should have been employed. As has been pointed out, the words do not necessarily, or even at first sight, imply a prohibi-

²⁷ Holand, *Natural Law and Legal Practice*, p. 267 (quoted in Hickey, *Summula Philosophiæ Scholasticæ*, III, p. 378).

²⁸ Hickey, *op. et loc. cit.*

tion. In the very first canon treating of the effects of excommunication, no indirect, ambiguous or circumlocutory method of expressing a prohibition is to be expected. This is all the more true when it is recalled that before the promulgation of the Code there was discrepancy concerning the extent of the prohibition to assist at divine offices. Moreover, in the other canons treating of the effects of excommunication, the terms used are for the most part clear and direct, ex. gr., *nec recipere, prohibetur, non fit particeps, nequit consequi, manet privatus*, etc.: the meaning of these terms cannot be misunderstood. Certainly there must be some distinction between the phrase *caret jure* and such terms as *prohibetur, prohibetur jure*.

A comparison between the canon under consideration and Canon 2275 seems to confirm the opinion that § 1 of Canon 2259 merely deprives excommunicates of the right of assist at divine offices. Canon 2275 legislates for those under ban of personal interdict. It states that they cannot assist at divine offices (*nequeunt . . . assistere*), while Canon 2259 says that excommunicates are without the right (*caret jure*) to do so. Hence, it would seem that the former are forbidden to assist at divine offices, while the latter are only deprived of the right to do so. One might object that if persons under ban of personal interdict are forbidden to assist at divine offices, a fortiori, excommunicates should be forbidden. Such reasoning is fallacious. The direct and immediate effect of an interdict is to forbid certain sacred things mentioned in the canons.²⁹ On the other hand, the direct and immediate effect of excommunication is to place one outside the communion of the faithful, and hence, only consequently does it forbid sacred things.³⁰ Primarily, it is the right to assist at divine offices that is common to the faithful, and of this right all excommunicates are deprived.

²⁹ Cf. Can. 2268.

³⁰ Cf. Can. 2257; Cappello, *De Censuris*, n. 462; Ayrinhac, *Penal Legislation*, pp. 143-144.

Canon 2275 further states that if persons under ban of personal interdict assist passively at divine offices, it is not necessary to expel them, but that all against whom a declaratory or condemnatory sentence has been passed, or whose interdict is otherwise notorious, must be repelled from active assistance which imports any participation in the celebration of divine offices. It will be noted that this legislation is identical with that of § 2 of Canon 2259. Yet it cannot be argued from this that *caret jure* of Canon 2259 must be understood in the same sense as *nequeunt assistere* of Canon 2275. With regard to active assistance, both legislations are identical because both notoriously interdicted persons and notoriously excommunicated persons are forbidden to assist actively at divine offices. It is not necessary to expel a personally interdicted person who assists passively, because, although he is forbidden to do so, the Church for some reason or other, probably to avoid scruples and scandal, does not desire to enforce the prohibition. This need not necessarily be the reason why it is not necessary to expel a *toleratus* who assists passively; before such an assertion is made it must be proven that the *tolerati* are forbidden to assist passively at divine offices. The dispositions of law are the same, but it would seem that the reasons behind them are different.

When one considers that practically no *toleratus* thinks that he is obliged to remain away from divine offices and that no confessor or ecclesiastical superior ever enforces such an obligation, and, moreover, that the opinion which held that the *tolerati* were no longer forbidden to assist passively at divine offices was gradually gaining ground, there seems to be sufficient evidence why such a phrase as *caret jure* was employed. Any other phrase might have been construed as a prohibition affecting all excommunicates, for Canon 2259, § 1 is general; it legislates for all excommunicates without exception (*excommunicatus quilibet*). Yet, as will be seen later, the use of this phrase has not changed the law substantially with regard to the *vitandi*, who are still forbidden to assist either

actively or passively at divine offices, nor with regard to active participation on the part of other excommunicates, especially such as are notoriously known to be under ban of excommunication.

The foregoing discussion has reference solely to the interpretation of § 1. It would seem that this portion of the canon merely deprives excommunicates in general of the right to assist at divine offices. If there are any prohibitions in this matter they must be deduced from the legislation contained in § 2. Before commencing to discuss the second part of the canon, however, the final clause of § 1, "*non tamen praedicationi verbi Dei*" must be taken into consideration.

Non tamen praedicationi verbi Dei.

Ever mindful of the command of her divine Master to preach the Gospel to every creature, the Church has always been solicitous that no one be deprived of hearing the word of God. The fourth Council of Carthage decreed that bishops were to prohibit no one, either Gentile, heretic or Jew from entering the church or from hearing the word of God.³¹ When the Bishop of Ferrara asked whether it was permissible to gather together in the church once a week or once a month those under ban of excommunication or interdict in order to preach to them and to induce them to correction, he was informed that he could do so without any scruple of conscience whenever he saw it expedient, as long as no divine office was celebrated for them.³² Another reason for the anxiety of the Church in this matter, especially with regard to persons under censure, is due to the fact that hearing the word of God is always a most useful and sometimes a necessary means to bring the delinquent to repentance.³³

³¹ C. 67, D. 1.

³² C. 43, X, *de sent. excom.* V, 39: " * * * respondemus, quod sine scrupulo conscientiae hoc facere poteris, quum videris expedire, dummodo contra formam interdicti nullum eis divinum officium celebretur."

³³ Vermeersch-Creusen, *Epitome*, III, n. 461.

ASSISTANCE AT DIVINE OFFICES

The attitude of the Church in this regard is retained in the Code, which neither deprives excommunicates of the right to attend the preaching of the word of God, nor forbids them to do so.

What is included under the term *praedicatio verbi Dei*? Under the caption in the Code, "*De divini verbi praedicatione*," come catechetical instructions, sermons and missions.³⁴ In regard to the latter, it may be said that even the *vitandi* may attend them in so far as they are composed of instructions, sermons and the like.³⁵

Both Cocchi³⁶ and Blat³⁷ are of the opinion that excommunicates may attend instructions, sermons, etc., even though they take place during Holy Mass. However, permission to be present at instructions, sermons and the like does not *per se* permit the *vitandi* to assist at the divine offices which precede or follow them.³⁸

Si passive assistat toleratus, non est necesse ut expellatur; si vitandus, expellendus est, aut si expelli nequeat, ab officio cessandum, dummodo id fieri possit sine gravi incommodo; ab assistentia vero activa, quae aliquam secumferat participationem in celebrandis divinis officiis, repellatur non solum vitandus, sed etiam quilibet post sententiam declaratoriam vel condemnatoriam aut alioquin notorie excommunicatus.

Following the principle *odiosa restringenda* and the more benign interpretation, it would seem that § 1 of Canon 2259 must be interpreted merely as depriving excommunicates in general of the right to assist at divine offices. If there are any prohibitions in this matter, they must be deduced from the legislation found in § 2. It is true that *per se* § 2 does not contain any prohibition; it

³⁴ Lib. III, tit. XX, Can. 1327-1351.

³⁵ Special reference is made here to the *vitandi*, because it would seem that they alone are forbidden to assist passively at divine offices. Cf. *infra*, p. 64ff.

³⁶ *Commentarium*, VIII, n. 87.

³⁷ *Commentarium*, V, *De Delictis et Poenis*, n. 86.

³⁸ Augustine, *Commentary*, VIII, p. 177.

is a norm to guide others in enforcing the privation entailed in § 1. Yet from the legislation of § 2 one can easily deduce that the privation of the right to assist at divine offices extends in some cases even to a prohibition. As Blat remarks, the prohibition to assist at divine offices remains in so far as it is implicitly contained in § 2.³⁹ For the sake of clarity, the discussion of § 2 will be divided into three headings. In the first place, passive assistance on the part of the *tolerati* will be considered; secondly, passive assistance on the part of the *vitandi* will be discussed; finally, active participation in divine services with regard to all excommunicates will be taken into consideration.

PASSIVE ASSISTANCE BY THE TOLERATI

Si passive assistat toleratus, non est necesse ut expellatur.

§ 1 does not seem to forbid any excommunicate to assist at divine services. Nor can a prohibition with regard to passive assistance on the part of the *tolerati* be deduced from § 2, which simply states that if a *toleratus* assists passively, it is not necessary to expel him. The clause “non est necesse ut expellatur” indicates that *per se* a *toleratus* may be expelled. What is the reason why it is not necessary to expel a *toleratus*? Is it because the faithful have an option of associating with a *toleratus* or not, as they please? It is difficult, in fact, almost impossible, to believe that such is the reason for this disposition of law. While theoretically it may be true that the faithful may associate, or not associate, with a *toleratus*, as they see fit, yet this theory can be put into practice only in certain cases and within well defined limits. It can never be put into practice when such a course of action would cause scandal or result in an unwarranted revelation of another’s delinquency. In other words, it can never be put into practice publicly with regard to occult excommunicates. Yet the legisla-

³⁹ *Commentarium*, V, *De Delictis et Poenis*, n. 86.

tion under discussion makes no distinction between occult and public excommunicates; it is not necessary to expel any *toleratus*. Furthermore, the legislation has reference to divine offices, which are almost always of a public character. Moreover, since the excommunicates under discussion are tolerated by the Church, there is no reason why they should not be tolerated by the faithful in general.

It is not necessary to expel the *tolerati* who assist passively, because, although they have no *right* to assist, they do not seem to be forbidden to do so. As Vermeersch-Creusen, commenting upon § 1 of Canon 2259, remark: "*Ipsis Codicis verbis solvitur disputatio olim inter auctores vicens num excommunicato tolerato divinis officiis assistere liceret.*"⁴⁰ The same authors, commenting on the clause, "*Si passive assistat toleratus, non est necesse ut expellatur,*" write: "*Confirmatur disciplina mitior quae jam a sat multis annis vigeat et praeclaros defensores habebat. Assistentia enim passiva divinis officiis, nisi in signum contemptus fiat, ad convertendos animos plurimum valet.*"⁴¹ Genicot writes: "*Assistentia divinis officiis non prohibita est excommunicatis toleratis * * * Immo Ecclesia heterodoxos potius allicit ad officia sua frequentanda quam eos ab iisdem removet, cum hac frequentatione crebro ad conversionem adducantur.*"⁴²

PASSIVE ASSISTANCE BY THE *VITANDI*

It would seem that by virtue of § 1 not even the *vitandi* are forbidden to assist at divine offices; they are merely deprived of the right to do so. There can be no doubt, however, but that they are forbidden to assist even passively at divine offices. This is evident from § 2, which states that if a *vitandus* assists passively, he must be expelled (*expellendus*), or, if he cannot be expelled, the celebration of the divine office must cease (*cessandum*), if

⁴⁰ *Epitome*, III, n. 461.

⁴¹ *Ibidem*.

⁴² *Institutiones Theologiae Moralis*, 10 ed., II, n. 583.

this can be done without a grave inconvenience. In both cases, the Gerundive is employed—*expellendus*, *cessandum*—thus implying necessity or obligation. In the case of the *vitandi*, the privation of the right to assist at divine offices extends to a prohibition.

Si vitandus [passive assistat] expellendus.

The Code states the obligation of expelling a *vitandus*, but offers no special regulations as to the method of procedure. The usual course of action was to warn the excommunicate to withdraw; if he failed to comply with this warning, he was expelled by force whenever this was possible. The term *expellendus* leads one to believe that the same course of action is to be followed at the present time. The clause “*dummodo id fieri possit sine gravi incommodo*,” which occurs later in the canon, seems to have reference to the cessation of a divine office. However, since the obligation of expelling a *vitandus* is of ecclesiastical origin, it would not bind in the face of a grave inconvenience. The necessity of applying physical force to effect the expulsion would not generally constitute a grave inconvenience, since the civil court, especially in this country, would usually uphold church authority in matters of this kind.

Si expelli nequeat [vitandus] ab officio cessandum.

If a *vitandus* cannot be expelled, the celebration of a divine office must cease, unless, of course, the rubrics demand a continuance. Thus, in the celebration of Mass if the celebrant has not begun the Canon, he must discontinue the celebration of Mass: if he has commenced the Canon, but has not yet consecrated, he may either discontinue Mass, or, after all but the server have departed, he may proceed with the Mass to the communion, finishing the remainder in the sacristy or some other becoming place: if he has already consecrated, however, he may not discontinue Mass, but after all but the server

have withdrawn, he is to proceed with the Mass to the communion, finishing the remainder as stated above.⁴³

Ab officio cessandum, dummodo, id fieri possit sine gravi incommodo.

If a *vitandus* cannot be expelled, the celebration of a divine office must cease, “dummodo id fieri possit sine gravi incommodo.” Before the Code, Wernz wrote of the singular difficulty at the time of observing the letter of the law concerning the expulsion of a *vitandus* or the cessation of a divine office. He hinted at the necessity of a milder discipline in this matter, “ne quod in odium delinquentis est statutum, convertatur in scandalum et damnum fidelium”: he added that a milder discipline seemed to have been approved by practice.⁴⁴ The Code has taken this milder practice into consideration and states that a divine office must cease, if it can be done without a grave inconvenience. “The clause ‘*dummodo id fieri possit sine gravi incommodo*’ applies principally, perhaps exclusively, to those attending divine services. The celebrant can in practically all cases discontinue services ‘*sine gravi incommodo*’ as far as he himself is concerned, though from a merely spiritual standpoint, there are conceivably some instances in which it would be a ‘*grave incommodum*’ were he to deprive himself of the benefits and consolations of the sacrifice. There might be some cases, too, in which he would be obliged to continue services because of personal obligations, the non-fulfillment whereof would mean a ‘*grave incommodum*’ to him.”⁴⁵ It would seem that not unfrequently the cessation of a divine office would be connected with a grave inconvenience. This is especially true of the Sacrifice of the Mass. In this matter one must be careful “ne

⁴³ Cf. Suarez, *De Censuris*, dist. XII, s. 1, n. 10; S. Alphonsus, *Theologia Moralis*, VII, n. 178; D'Annibale, *Summula Theologiae Moralis*, I, n. 360; Vermeersch-Creusen, *Epitome*, III, n. 469; Missale Romanum, *De Defectibus in Celebratione*, X, 2.

⁴⁴ VI, n. 191, not. 290.

⁴⁵ Motry, *Diocesan Faculties*, p. 83.

quod in odium delinquentis est statutum, convertatur in scandalum et damnum fidelium.”⁴⁶

ACTIVE PARTICIPATION IN DIVINE OFFICES

It has already been seen what active assistance at divine offices is. That it is to be understood in a wide sense is clear from the clause “quae aliquam secumferat participationem in celebrandis divinis officiis.”⁴⁷ One may be said to participate actively not only when he performs the office of celebrant, but also when he acts as deacon, subdeacon, master of ceremonies, acolyte and likewise when he serves a low Mass.⁴⁸ Cappello considers it doubtful whether an organist may be said to participate actively in divine services.⁴⁹ Chelodi favors the negative view.⁵⁰ However, the affirmative opinion, which numbers among its defenders Noldin-Schönegger⁵¹ and Augustine,⁵² is to be preferred. Certainly an organist’s part in divine offices is something more than passive. Furthermore, it is clear from the canon that active assistance is to be understood in a broad sense. Singing in the choir at divine offices comes under the heading of active participation.⁵³

Not only the *vitandi*, but also all excommunicates whose censure is notorious, are to be repelled from active assistance which imports any participation in the celebration of divine offices. In order that a *toleratus* be repelled his excommunication must be notorious. Notoriety either of law or of fact suffices, for the canon speaks not only of excommunicates against whom a declaratory or condemnatory sentence has been passed (notoriety of

⁴⁶ Wernz, VI, n. 191, not. 290; cf. Cappello, *De Censuris*, n. 159; Ornica, *Modificationes in Tractatu de Censuris*, p. 92; Pruemmer, *Manuale Juris Canonici*, Q. 571; Chelodi, *Jus Poenale*, n. 38, not. 2.

⁴⁷ Sole, *De Delictis et Poenis*, n. 215.

⁴⁸ Cappello, *De Censuris*, n. 149; Chelodi, *Jus Poenale*, n. 37, not. 4; Augustine, *Commentary*, VIII, p. 177.

⁴⁹ *De Censuris*, n. 149.

⁵⁰ *Jus Poenale*, n. 37, not. 4.

⁵¹ *De Censuris*, n. 39.

⁵² *Commentary*, VIII, p. 177.

⁵³ Cf. Cappello, *De Censuris*, n. 149; Augustine, *Commentary*, VIII, p. 177; Chelodi, *Jus Poenale*, n. 37, not. 4.

law) but also of all those whose excommunication is otherwise notorious (notoriety of fact).

The question now arises whether the *tolerati* whose excommunication is not notorious are forbidden to participate actively in divine services. It is to be noted that no explicit mention is made of this question in § 2. It must be admitted that this question furnishes a reasonable objection to the interpretation given to § 1. When § 1 is understood in a prohibitory sense, the question does not arise; according to such an interpretation all excommunicates are forbidden to participate either actively or passively in divine offices. However, in view of the arguments brought forward, the interpretation given to § 1 seems justified. Moreover, it would seem that § 1 has reference principally, if not exclusively, to passive assistance. Comparatively few have a right to active participation in divine services. Those who can lay claim to such a right are sufficiently provided for in the other canons dealing with the effects of excommunication, and especially in Canon 2261.

To assert unreservedly that even the *tolerati* whose excommunication is not notorious are permitted to participate actively in divine offices would be contrary to the tenor of the censure of excommunication. Even a cursory reading of the other canons treating of the effects of excommunication indicates that no such assertion can safely be made. It seems that Canon 2259, § 2, contains an implicit prohibition in this regard. The fact that the canon speaks of repelling—*repellatur*, a rather strong term, implying, too, an obligation—notorious excommunicates seems to indicate that all excommunicates are forbidden to take an active part in divine services. The canon speaks of repelling only notorious excommunicates. It will be noted that this legislation is in strict conformity with Canon 2232. This canon states that a *latae sententiae* penalty, whether medicinal or vindictive, *ipso facto* binds the delinquent who is conscious of the delict in both forums; before a declaratory sentence, however, the delinquent is excused from observing the

penalty whenever he cannot observe it without loss of good repute and in the external forum no one can exact the observance of the penalty, unless the delict is notorious. The rigid conformity between § 2 of Canon 2259 and Canon 2232 seems to imply that all excommunicates are forbidden to take an active part in divine services. However, the *tolerati* whose excommunication is not notorious are not to be repelled from participating actively. The Church, as it were, tolerates active participation on the part of such excommunicates in order to avoid scruples and the danger of scandal or imprudent defamation.⁵⁴

EXCOMMUNICATES AND OBLIGATIONS TO ASSIST AT DIVINE OFFICES

A very important question now arises concerning excommunicates and the obligations which may bind them to assist at divine offices. This question is of prime importance in regard to the obligation of hearing Mass on Sundays and Holy Days of Obligation. The Holy Sacrifice of the Mass is included among the divine offices at which excommunicates are either forbidden, or at least deprived of the right, to assist. Are excommunicates, therefore, bound by the obligation to hear Mass on the prescribed days?

It may be stated as a general principle that *per se* ecclesiastical punishments do not release one from obligations: no one should benefit by his malice. This is in conformity with Canon 87 which declares that by baptism one is constituted a person in the Church of Christ with all the rights and duties of Christians, unless, as far as rights are concerned, there is an obstacle impeding ecclesiastical communion, or a censure imposed by the Church. *Per accidens*, however, punishments may excuse from some obligations. This is the case when a punishment, or an effect thereof, involves a prohibition to place a certain act in which some obligation con-

⁵⁴ Vermeersch-Creusen, *Epitome*, III, n. 461.

sists.⁵⁵ It may be said to be the common teaching of theologians that those who are forbidden to assist at divine offices are thereby released from the obligation to attend Mass on Sundays and Holy days of Obligation.⁵⁶ It seems to be the common opinion, too, that one is not obliged to seek absolution from the censure in order to fulfill the precept of hearing Mass.⁵⁷ If, however, an excommunicate neglects to seek absolution from the censure precisely that he might be free from the obligation of hearing Mass, he would be guilty of mortal sin.⁵⁸

Since the *vitandi* are forbidden to assist even passively at divine offices, they are not bound by the obligation to hear Mass. The question is not so easily solved with regard to the *tolerati*. One opinion holds that they are forbidden to assist even passively at divine offices. The defendants of this opinion are quite consistent in teaching that the *tolerati* are not bound by the obligation under consideration.⁵⁹ The authors who claim that the *tolerati* are not forbidden, but merely deprived of the right to assist at divine services, hold that they are not released from the obligation of hearing Mass.⁶⁰

Which opinion is to be followed in practice? It may safely be said that both opinions are probable. Hence,

⁵⁵ Maroto, *Institutiones Juris Canonici*, I, n. 196.

⁵⁶ Schmalzgrueber, pars IV, tit. XXXIX, n. 131; S. Alphonsus, *Theologia Moralis*, VII, n. 161, n. 175; Lehmkuhl, *Theologia Moralis*, 12 ed., II, n. 1138; Cappello, *De Censuris*, n. 149; Maroto, *Institutiones Juris Canonici*, I, n. 196, not. 3; Chelodi, *Jus Poenale*, n. 37; Augustine, *Commentary*, VIII, p. 177.

⁵⁷ S. Alphonsus, *Theologia Moralis*, VII, n. 161; Bucceroni, *Commentarium de Censuris*, n. 103; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 401; Lehmkuhl, *Theologia Moralis*, 12 ed., II, n. 1138; Cappello, *De Censuris*, n. 108.

⁵⁸ S. Alphonsus, Cappello, *loc. cit.* It is to be noted that excommunicates are not excused from the precepts of annual confession and Paschal communion; they are obliged to seek absolution from the censure in order to fulfill these precepts.

⁵⁹ Chelodi, *Jus Poenale*, n. 37; Cf. Cappello, *De Censuris*, n. 108, 149; Cocchi, *Commentarium*, VIII, n. 87; Cipollini, *De Censuris Latæ Sententiæ*, p. 58.

⁶⁰ Vermeersch-Creusen, *Epitome*, III, n. 461; Ayrinhac, *Penal Legislation*, p. 121; Genicot-Salsmans, *Institutiones, Theologiæ Moralis*, 10 ed., II, n. 583.

the obligation cannot be urged even against the *tolerati*. The opinion may be ventured that not only are the *tolerati* not to be forbidden to attend Mass, but they are rather to be encouraged to do so. It is by no means certain that they are forbidden to attend Mass; in fact, it seems more certain that they are not forbidden. Assistance at Mass will help to bring about more quickly the very end for which excommunication was imposed, namely, the emendation of the delinquent. Furthermore, presence at Mass may furnish the *tolerati* with the only opportunities they may have, or may take, to hear the word of God—always a most useful, and sometimes a necessary, means to bring them to a sense of duty.

Needless to say, excommunicates are not released from obligation of reciting the Divine Office. Theologians formerly taught that whenever an excommunicate recited the Office with a companion, he was obliged *sub veniali* to say “*Domine, exaudi*,” etc., in place of “*Domineus vobiscum*.” Cappello reasonably denies that excommunicates sin by not doing so. Such an obligation, especially under pain of sin, cannot be proven.⁶¹

No excommunicate is forbidden to enter a church or to pray there privately. Indeed, some authors teach that an excommunicate who keeps himself separated from others and prays privately in a place where divine offices are being celebrated does not offend against the censure, since in such a case there is no communication *in sacris* with others.⁶²

As will be seen more fully later, excommunicates are permitted to venerate and make use of sacred images, relics, holy water, etc. Of course, they do not gain the indulgences attached to the use of such things, nor do they perceive the fruits resulting from the prayers and blessings of the Church.

⁶¹ *De Censuris*, n. 149.

⁶² Cf. Cappello, *De Censuris*, n. 149; D'Annibale, *Summula Theologiae Moralis*, I, n. 360; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, 399; S. Alphonsus, *Theologia Moralis*, VII, n. 149.

At the present time, there is no penalty attached to the violation of this effect of excommunication by lay excommunicates, nor, according to the more common opinion, by those who admit lay excommunicates to divine offices.⁶³ Clerics, however, who knowingly and willingly communicate *in divinis* with a *vitandus* (i. e., *clericus*) and receive him in divine offices *ipso facto* incur an excommunication reserved *simpliciter* to the Holy See.⁶⁴ Likewise clerics who knowingly admit clerics against whom a declaratory or condemnatory sentence of excommunication has been passed to the celebration of divine offices, forbidden by the censure, *ipso facto* incur an interdict *ab ingressu Ecclesiae*, which perdures until they have given due satisfaction to him whose sentence they have contemned.⁶⁵

⁶³ Chelodi, *Jus Poenale*, n. 73; Cocchi, *Commentarium*, VIII, n. 177-178; Augustine, *Commentary*, VIII, p. 353ff.; cf. Vermeersch-Creusen, *Epitome*, III, n. 537.

⁶⁴ Can. 2338, § 2.

⁶⁵ Can. 2338, § 3.

CHAPTER II

RECEPTION OF THE SACRAMENTS AND SACRAMENTALS ECCLESIASTICAL BURIAL

CANON 2260

§ 1. *Nec potest excommunicatus Sacramenta recipere; imo post sententiam declaratoriam aut condemnatoriam nec Sacramentalia.*

§ 2. *Quod attinet ad ecclesiasticam sepulturam, servetur praescriptum can. 1240, § 1, n. 2*

I. RECEPTION OF THE SACRAMENTS

Nec potest excommunicatus Sacramenta recipere.

It may be safely asserted that if the censure of excommunication has ever meant anything, it has always meant exclusion from the reception of the sacraments. Even the censure of minor excommunication excluded those under its ban from the reception of the sacraments; in fact, this was its one direct effect. The Code is in conformity with the old law in denying the sacraments to all under ban of excommunication.¹

The reason for this exclusion is evident. One who obstinately refuses to obey the precepts of the Church is rightly excluded from participating in her greatest privileges. Furthermore, excommunication is a medicinal remedy; its primary end is to bring the delinquent back to a sense of duty. Evidently nothing so contributes to the accomplishment of this purpose as the denial of the sacraments.²

¹ C. 32, 59, X, *de sententia excommunicationis*, V, 39; c. 24, *de sententia excommunicationis*, V, 11 in VI^o; c. 1, *de privilegiis*, V, 7 in Extrav. comm.; Conc. Trid. sess. 25, *de ref.*, c. 3; Pontificale Romanum, tit. *De Confirmandis*; Rituale Romanum, t. V. c. 1, *de Sacramento Extremae Unctionis*, n. 8.

² Cf. Schmalzgrueber, pars IV, tit. XXXIX, n. 128; Smith, *Elements of Ecclesiastical Law*, III, n. 3195; Sole, *De Delictis et Poenis*, n. 216.

Canon 2260, § 1 states that an excommunicate cannot receive the sacraments. While the Code does not employ the term *licite*, as it does when speaking of the administration of the sacraments,³ Canon 2260 evidently has reference to the licit reception of the sacraments. The validity of a sacrament cannot be impeded by an ecclesiastical penalty. Hence sacraments received by an excommunicate are valid, even if they are received in bad faith. An exception, of course, must be made with regard to the Sacrament of Penance which one knowingly attempts to receive before obtaining absolution from the censure of excommunication. If one knowingly seeks absolution from sin before being freed from the ban of excommunication, he lacks the dispositions necessary for the valid reception of the Sacrament of Penance; when the proper dispositions are wanting, the absolution from sins is of no value, and consequently no sacrament is received. It is clear, however, that the invalidity of the sacrament is due, not to the censure, but to the lack of proper disposition on the part of the penitent.⁴

No excommunicate can knowingly receive any sacrament licitly before obtaining absolution from the censure. One who attempts to do so sins gravely, unless he is excused by ignorance, grave fear, or by reason of avoiding grave infamy or loss in goods, and then apart from any contempt of the censure. We have said *knowingly*, because if one under ban of excommunication receives a sacrament in good faith, he receives not only validly but licitly as well. This is true also with regard to the Sacrament of Penance.⁵

The sacraments are the normal channels through which we receive divine grace. The privation of their reception constitutes one of the most severe effects of the censure of excommunication. Practically, however, an excommunicate will be deprived of the sacraments only through

³ Can. 2261, § 1.

⁴ Cappello, *De Censuris*, n. 147.

⁵ Cf. Can. 2247, § 3.

his own malice.⁶ Thus in danger of death any priest, although he is not approved for confessions, licitly and validly absolves all penitents from all censures, no matter how they are reserved or how notorious they may be, even if there is present an approved priest.⁷ Moreover, Canon 2254 gives confessors faculties to absolve from all censures in certain more urgent cases, namely: (1) when a *latae sententiae* censure cannot be observed in the external forum without danger of giving scandal or without danger of destroying the good repute of the censured person; (2) when it is a hardship for the penitent to remain in mortal sin during the time that is required to obtain the necessary faculty. It is to be noted that theologians teach that it may be a hardship for a penitent to remain in mortal sin even for one day. The penitent must feel the hardship subjectively, but the confessor is allowed to instill this feeling. Of course, in these more urgent cases with regard to all censures, and even in case of the danger of death with regard to censures *ab homine* and those reserved to the Holy See *specialissimo modo*, there is the question of the *recursus*. But this digression is merely to point out how anxious the Church is to have all return as soon as possible to her communion and to the benefits attached thereto. It is a striking proof, too, of the truly medicinal nature of censures in general, and of excommunication in particular.⁸

From the fact that excommunicates are forbidden to receive the sacraments, it follows as a logical and necessary consequence that priests and other ministers of the Church are obliged to refuse to administer the sacraments to them. The divine law forbids one to administer a sacrament to the unworthy. The virtue of religion demands that a sacred thing be not exposed to profanation; the virtue of charity forbids cooperation in another's sin and the giving of scandal; furthermore, fidelity in the minister forbids him to give that which is holy to dogs

⁶ Cf. Cerato, *Censurae Vigentes*, n. 37.

⁷ Can. 882.

⁸ Cerato, *Censurae Vigentes*, n. 37.

or to cast pearls before swine.⁹ In this matter one must follow the rules given by moral theologians concerning the denial of the sacraments to unworthy persons.¹⁰ A person whose unworthiness is publicly known is to be denied the sacraments whether he petitions them publicly or in secret: a person whose unworthiness is not publicly known is to be denied the sacraments if he petitions them in secret; if, however, he petitions them publicly, it is not permitted to refuse him. It might be added that very seldom would it be so publicly known that a person was under ban of excommunication that for this reason alone could one publicly refuse him the sacraments; usually such a one would be classed under public sinners. What has been said is true both with regard to the *tolerati* and the *vitandi*. With regard to the latter class, there is, besides the divine law, the ecclesiastical law which forbids communication *in sacris* with such persons.¹¹

Both in the Decretals¹² and in the Constitution "*Apostolicae Sedis*"¹³ there were penalties inflicted for the administration of the sacraments to excommunicates. The penalty under the new law is found in Canon 2364, which contains a general legislation "covering the illicit and invalid administration of the sacraments to all classes of persons disqualified by divine or ecclesiastical law from receiving them."¹⁴ It states that a minister who dares to administer the sacraments to those who are forbidden to receive them either by divine or ecclesiastical law is to be suspended from administering the sacraments for a time to be defined by the prudent judgment of the Ordinary and he is to be punished by other penalties according to the gravity of the offence: beside, other particular penalties stated in law for delinquencies

⁹ Matt. VII, 6; cf. Cappello, *De Sacramentis*, I, n. 70.

¹⁰ Cf. also Can. 855, § 1, § 2.

¹¹ Wernz, VI, n. 189, not. 271.

¹² C. 8, *de priv.*, V, 7, in VI°.

¹³ § II, n. 17; § VI, n. 2; (*Fontes*, n. 552).

¹⁴ Murphy, *Delinquencies and Penalties in the Administration and Reception of the Sacraments*, p. 3.

of this kind retain their penal force. It is readily seen that this canon applies to the unlawful administration of the sacraments to excommunicated persons, all of whom are forbidden by ecclesiastical law to receive them.

II. RECEPTION OF THE SACRAMENTALS

Imo post sententiam declaratoriam aut condemnatoriam nec Sacramentalia.

Sacramentals are defined by the Code as follows: “res aut actiones quibus Ecclesia in aliquam sacramentorum imitationem, uti solet, ad obtinendos, ex sua impetratione, effectus praesertim spirituales.”¹⁵

The Code divides the sacramentals into: (1) *res*, when the spiritual effect is brought about by means of blessed objects, ex. gr., holy water, blessed candles, etc.; these are sometimes designated as permanent sacramentals because of their perdurable nature; (2) *actiones*, when the effect is brought about directly as in the case of blessings; these are also known as transient sacramentals because of the transitive quality of the act of blessing.¹⁶

A subdivision of sacramentals which for our purpose must be taken into consideration is the two-fold division of blessings (consecrations and blessings properly so-called) into constitutive blessings and invocative blessings. Constitutive blessings are “those that permanently consecrate or dedicate the subject—person, place or thing—to God,” or to divine worship. Invocative blessings are those by which God is implored to bestow some special grace or favor upon the subject.¹⁷

It would seem that prior to the Code there was no explicit legislation forbidding the reception of the sacramentals in general to excommunicated persons.¹⁸ The very nature of excommunication, however, and the manner in which the effects thereof were formerly carried out leave no doubt but that all public excommunicates

¹⁵ Can. 1144.

¹⁶ Paschang, *The Sacramentals*, p. 10.

¹⁷ Paschang, *The Sacramentals*, p. 49; Cappello, *De Sacramentis*, I, n. 113.

¹⁸ Cf. Crnica, *Modificationes in Tractatu de Censuris*, p. 93.

were repelled from receiving the sacramentals. Most theologians and canonists permitted the *use* of the sacramentals to excommunicates.¹⁹ Concerning this question, Schmalzgrueber wrote as follows:

Permittitur excommunicato, et conveniens est usus SS. imaginum, reliquiarum, aquae benedictae, et reliquorum sacramentalium. *Neque obstat*, quod aqua benedicta, et similia habeant valorem ex orationibus Ecclesiae, quibus privatur excommunicatus; nam esto, quod iis uti non possit, ut effectus provenientes ex orationibus Ecclesiae ipsi applicentur, uti tamen illis potest in illarum venerationem, et honorem, et ut se illarum memoria, et fructus recordatione, quo per excommunicationem privatur, ad poenitentiam excitet.²⁰

Canon 2260, § 1 contains what seems to be the first explicit legislation concerning excommunicates and the sacramentals in general. It states that after a declaratory or condemnatory sentence an excommunicate cannot receive the sacramentals. Hence, not only the *vitandi*, but also the *tolerati* whose excommunication is notorious by notoriety of law, i. e., after a declaratory or condemnatory sentence, are forbidden to receive the sacramentals.

It has doubtlessly been noticed that in the heading of this portion of the present chapter and in the preceding paragraph, the term *receive* has been employed in reference to the prohibition regarding the sacramentals. Some authors speak of the *use* of sacramentals as being prohibited.²¹ This does not seem to be entirely correct. It seems to be their *reception* and not their *use* that is forbidden. Canon 2260, § 1 reads as follows: “Nec potest excommunicatus Sacramenta recipere; imo post

¹⁹ Cf. Suarez, *De Censuris*, disp. XII, s. 3; S. Alphonsus, *Theologia Moral*, VII, n. 174; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 396.

²⁰ Pars IV, tit. XXXIX, n. 133.

²¹ Augustine, *Commentary*, VIII, p. 180; Noldin-Schönegger, *De Censuris*, n. 40; Ayrinhac, *Penal Legislation*, p. 122.

sententiam declaratoriam aut condemnatoriam nec Sacramentalia." The first part of the paragraph speaks of the *reception* (*recipere*) of the sacraments, hence the proper translation of the second part of the paragraph is: "after a declaratory or condemnatory sentence (an excommunicate cannot receive) even the sacramentals." While there is no difference between the *use* (passive) and the *reception* of the sacraments, there is, however, a distinction between the *use* and the *reception* of the sacramentals. Some sacramentals are *used*, ex. gr., holy water, blessed candles, etc.; others are *received*, ex. gr., the blessing of a woman *post partum*, etc. If it is the *use* in general of the sacramentals which is forbidden, the excommunicates mentioned in the canon may not make use of, even in private, such sacramentals as holy water, blessed candles, rosaries, etc. In this matter we are dealing with *odiosa*, therefore strict interpretation is the rule. A strict interpretation of Canon 2260 would seem to be that the only sacramentals which are forbidden excommunicated persons are those which are *received*, that is, as sacramentals, "in aliquam Sacramentorum imitationem." The prohibition seems to have reference primarily, perhaps solely, to constitutive and invocative blessings and consecrations. Such sacramentals are certainly forbidden excommunicated persons after a declaratory or condemnatory sentence. Are they forbidden under pain of nullity? Since sacramentals are controlled exclusively by ecclesiastical law, there is no doubt but that the Church could place freedom from censure as a requisite for their valid reception. In order to answer the proposed question satisfactorily, a few remarks will have to be prefaced concerning the manner in which the sacramentals produce their effects.

The majority of theologians teach that the sacramentals produce their effect not *ex opere operato*, as do the sacraments, but *ex opere operantis (Ecclesiae)*. "They operate by reason of the supporting prayer of the Church. When the Church makes use of the Sacramentals she either *formaliter* or *virtualiter* asks God to grant

a certain effect and it is in virtue of this prayer of the Church that the Sacramentals operate.”²²

Do the sacramentals operate infallibly? Theologians are not at agreement concerning this question, but as Vermeersch-Creusen remark: “Magis tamen verbis quam re dissentiunt.”²³ A distinction must be made between the sacramentals that consist in constitutive blessings and those that consist in invocative blessings. The former infallibly produce their effect, provided no obstacle stands in the way. They infallibly dedicate the subject—person, place or thing—to divine worship. However, “Sacramentals that consist in invocative blessings and consecrations are not absolutely infallible in their effects. The latter kind of Sacramentals, by their very nature, are destined to obtain, through the bounty of God, spiritual or temporal favors upon persons or things. Now, although it is commonly held, that the prayers of the Church, as the Spouse of Christ (by reason of which the Sacramentals operate) are never in vain and always most acceptable to Almighty God, it cannot be maintained that for this reason they will always produce the *determined* effect, that the minister or the recipient may *directly* intend. In teaching that the Sacramentals operate infallibly, authors do not restrict this infallibility as regards invocative blessings and consecrations to a *definite* or *particular* effect. For it stands to reason that God cannot grant a favor by reason of a Sacramental that would be contrary to His Wisdom and Providence, and harmful to the recipient of the Sacramental.”²⁴ With regard to the constitutive blessings and consecrations it would seem that the Church has nowhere placed freedom from censure as a requisite for their valid reception. Hence, since sacramentals of this kind produce their effects infallibly, it must be said that they are validly, though illicitly, re-

²² Paschang, *The Sacramentals*, p. 32; cf. Vermeersch-Creusen, *Epitome*, II, n. 463; Pesch, *Praelectiones Dogmaticae*, VI, n. 338.

²³ *Epitome*, II, n. 463; Cappello, *De Sacramentis*, I, n. 103.

²⁴ Paschang, *The Sacramentals*, p. 35.

ceived by persons against whom a declaratory or condemnatory sentence of excommunication has been passed. With regard to the invocative blessings and consecrations, the question is not so easily solved. These sacramentals do not infallibly produce the direct effects intended. The difficulty is not so practical at any rate. Generally, the sacramental could be repeated. Moreover, in the final analysis, the effect of these sacramentals depends on the will of Almighty God. However, as far as the Church is concerned, their reception by persons against whom a declaratory or condemnatory sentence has been issued would seem to be invalid.²⁵ Since the effects of the sacramentals are obtained *ex impetratione Ecclesiae*, their administration seems to constitute a public prayer of the Church, in which excommunicates have no share. However, no certain conclusion can be deduced from this, for no excommunicate shares in the public prayers of the Church.²⁶ Concerning this question, however, Paschang writes as follows: “ * * * since there is question here of an ecclesiastical penalty, canon 2260 must, according to general principles, be interpreted strictly. No mention being made by said canon as to the invalidity of such reception, the milder interpretation would pronounce the reception valid.”²⁷

There is an exception to the law forbidding the reception of the sacramentals to certain classes of excommunicates. Canon 1152 declares that exorcisms can be pronounced not only over the faithful and catechumens, but even over non-Catholics and excommunicates. Since the Code makes no distinction, it would seem that exorcisms can be pronounced even over the excommunicates who are forbidden to receive the other sacramentals. “Neque excipiendi videntur ipsi vitandi excommunicati, cum hic agatur de directa liberatione a daemone, cujus infestae

²⁵ Vermeersch-Creusen, *Epitome*, III, n. 468; Cocchi, *Commentarium*, VIII, n. 88.

²⁶ Can. 2262.

²⁷ *The Sacramentals*, p. 74.

artes ipsam vim excommunicationis, poenae medicinalis, impedire possunt.”²⁸

III. ECCLESIASTICAL BURIAL

Quod attinet ad ecclesiasticam sepulturam, servetur praescriptum can. 1240, § 1, n. 2.

*Canon 1240, § 1, n. 2. Ecclesiastica sepultura privantur, nisi ante mortem aliqua dederint poenitentiae signa:
* * * excommunicati * * * post sententiam condemnatoriam vel declaratoriam.*

Ecclesiastical burial consists in the transfer of the body to the church, the funeral services held over it in the church and the depositing of it in a place legitimately deputed for the burial of the faithful departed.²⁹

All baptized persons are to be given ecclesiastical burial, unless they are expressly deprived of it by law. In this matter, catechumens who through no fault of their own die without baptism are likened to baptized persons.³⁰

Since ecclesiastical burial is the last sign and pledge of communion with the Church, *per se* it is to be denied to all who have never been members of the Church, or who have publicly defected from the Church. They also are justly deprived of this supreme honor who have, as it were, deserted the Church by the commission of public and grave crimes.³¹

Under the pre-Code discipline, excommunicates were to be deprived of ecclesiastical sepulture.³² Some authors were of the opinion that after the Constitution “*Ad vitanda*” the *tolerati* were not to be deprived of Christian burial, because this prohibition affected primarily the faithful and not the excommunicates, who, of course,

²⁸ Vermeersch-Creusen, *Epitome*, II, n. 469.

²⁹ Can. 1204.

³⁰ Can. 1239, § 3, § 2.

³¹ Vermeersch-Creusen, *Epitome*, II, n. 546.

³² C. 37, C. XI, q. 3; c. 32, C. XXIII, q. 8; c. 1, C. XXIV, q. 2; c. 12, 14, X, *de sepulturis*, III, 28; c. 8, X, *de haereticis*, V, 7; c. 5, X, *de privilegiis*, V, 33; c. 28, X, *de sententia excommunicationis*, V, 39.

could not bury themselves.³³ This does not seem to have been true. According to the most authors, not only the *vitandi*, but likewise the *tolerati* whose excommunication was notorious and public were to be denied Christian burial.³⁴ At any rate, the latter class would frequently have been denied it on the score of being notorious and public sinners.

The *vitandi*, even if they manifested signs of repentance before death, could not be buried in a sacred place before absolution from the censure.³⁵ It was not forbidden to inter in a sacred place, even before absolution from excommunication, the *tolerati* who gave signs of repentance before death. It was more becoming, of course, that they, too, should be absolved from the censure before being admitted to ecclesiastical sepulture.³⁶

If a *vitandus* who died impenitent was buried in a sacred place, the place became defiled and was in need of expiation.³⁷ According to the opinion of many authors, however, a sacred place was not defiled by the interment therein of an impenitent *toleratus*.³⁸

The body of an excommunicate which by accident, error or force had been interred in an ecclesiastical cemetery was to be exhumed and buried elsewhere, if it could be discerned from other bodies. If, however, the grave of the excommunicate could not be discerned from other graves, this disposition of law was not to be enforced, lest perhaps, by mistake the body of a person not excommunicated might be exhumed and buried in another place.³⁹

There were penalties attached to the violation of this effect of excommunication. Those who admitted to ecclesiastical burial persons excommunicated by name *ipso*

³³ Cf. Suarez, *De Censuris*, disp. XII, s. 4, n. 5.

³⁴ Cf. Wernz, VI, n. 192; Crnica, *Modificaciones in Tractatu de Censuris*, p. 95; Gury-Ballerini, *Theologia Moralis*, II, n. 965; *Rituale Romanum*, tit. 6, cap. 2, n. 2.

³⁵ C. 28, 38, X, *de sent. excom.* V, 39.

³⁶ Schmalzgrueber, pars IV, tit. XXXIX, n. 127; Wernz, VI, n. 192.

³⁷ C. 7, X, *de consecratione, etc.*, III, 40; Holweck, p. 120, § 46, not. 11.

³⁸ Cf. Suarez, *De Censuris*, disp. XII, s. 4, n. 5; Wernz, VI, n. 192.

³⁹ C. 12, X, *de sepultur.* III, 28.

facto incurred an interdict *ab ingressu ecclesiae* and remained under it until they had given due satisfaction to the one whose sentence they had contemned.⁴⁰ Those who demanded or forced ecclesiastical burial to be given to persons excommunicated by name *ipso facto* incurred a non-reserved excommunication.⁴¹

Canon 2260, § 2 states that in regard to ecclesiastical burial, the prescription of Canon 1240, § 1, n. 2 is to be observed. This legislation is to the effect that excommunicates against whom a condemnatory or declaratory sentence has been issued are to be denied ecclesiastical sepulture, unless they gave some signs of repentance before death. Hence not only the *vitandi* but also the *tolerati post sententiam* are to be deprived of Christian burial. The *tolerati*, however, against whom no sentence has been passed are not denied ecclesiastical burial as an effect of excommunication. They may be excluded from it for some other reason, for instance, because they are notorious apostates, or notoriously ascribed to some heretical, schismatical or Masonical sect, or to other societies of the same kind, or because they are public and manifest sinners.⁴²

No one, not even a *vitandus* or a *toleratus post sententiam*, who gave some signs of repentance before death, is to be refused Christian burial. In cases in which public scandal has not been repaired by public penance, the scandal can be removed sufficiently by a prudent revelation of the penance done in private.⁴³ Signs of repentance would include, besides requesting the presence of a priest, any act of piety, such as striking the breast, kissing a crucifix, uttering an ejaculation and the like.⁴⁴

⁴⁰ C. 8, *de priv.* V, 7, in VI°; Constitution, "*Apostolicae Sedis*," § VI, n. 2, (*Fontes*, n. 552).

⁴¹ Constitution, "*Apostolicae Sedis*," § VI, n. 2, (*Fontes*, n. 552).

⁴² Can. 1240, § 1.

⁴³ Vermeersch-Creusen, *Epitome*, II, n. 548.

⁴⁴ *S. C. S. Off.*, 19 Sept., 1877, (*Fontes*, n. 1054); 6 Jul. 1898, (*Fontes*, n. 1200).

If any doubt arises as to whether an excommunicate is to be granted ecclesiastical burial, the Ordinary should be consulted, if time permits. If the doubt remains, the person is to be given ecclesiastical burial, in such a manner, however, that no scandal will arise therefrom.⁴⁵ Any scandal that might arise in cases of this sort could be removed by declaring why burial was granted, by divulging the fact that signs of repentance were manifested before death, or, if possible, by denying pomp and solemn exequies.⁴⁶

One who is excluded from ecclesiastical burial is to be denied any funeral Mass, even an anniversary Mass, and also other public funeral services.⁴⁷ A funeral Mass (*Missa exsequialis*) is one that is celebrated with the body present in the church. The canon says "quaelibet Missa exsequialis," hence not even a private or low Mass is permitted. Anniversary Masses, that is to say, Masses celebrated on the anniversary of the demise, are not allowed. The term *Missa exsequialis* cannot be extended to include requiem Masses.⁴⁸ Consequently, it is not forbidden to offer Mass, even requiem Mass, for excommunicates who have been denied ecclesiastical sepulture. The application of such Masses, however, must be *privatim ac remoto scandalo* in accordance with Canon 2262, § 2, n. 2. Other public funeral services would include anything in the order of the exequies as described in the approved liturgical books.

Prescinding from scandal and contempt, an ecclesiastical law does not bind in the face of a grave inconvenience. Hence, when greater evils are to be feared from a denial of Christian burial, it may be conceded either wholly or partially.⁴⁹

⁴⁵ Can. 1240, § 2.

⁴⁶ Cocchi, *Commentarium*, V, n. 71; a Coronata, *De Locis et Temporibus Sacris*, p. 268; Cf. *Fontes*, nn. 1045, 1200.

⁴⁷ Can. 1241.

⁴⁸ Quigley, *Condemned Societies*, p. 81.

⁴⁹ Vermeersch-Creusen, *Epitome*, II, n. 550; Cocchi, *Commentarium*, V, n. 71.

Although a sacred place is violated by the burial therein of all excommunicates against whom a sentence has been passed,⁵⁰ the body of a *vitandus* only which has been buried in a sacred place contrary to the law of the canons is to be exhumed and buried in unblest ground, if it can be done without serious inconvenience.⁵¹ Permission to do this must be obtained from the Ordinary, who is never to grant such permission unless the body can be discerned with certainty from other bodies.⁵²

Penalties for the violation of this effect of excommunication are contained in Canon 2339. Those who dare to demand or force ecclesiastical burial to be given to a *vitandus* or a *toleratus post sententiam ipso facto* incur a non-reserved excommunication. Those who of their own accord grant ecclesiastical burial to the same *ipso facto* incur an interdict *ab ingressu ecclesiae* reserved to the Ordinary.

⁵⁰ Can. 1207, 1172, § 1, n. 4.

⁵¹ Can. 1242; cf. can. 1175.

⁵² Can. 1214.

CHAPTER III

I. THE ACTIVE USE OF THE SACRAMENTS AND SACRAMENTALS

CANON 2261

§ 1. *Prohibetur excommunicatus licite Sacramenta et Sacramentalia conficere et ministrare, salvo exceptionibus quae sequuntur.*

§ 2. *Fideles, salvo praescripto § 3, possunt ex qualibet justa causa ab excommunicato Sacramenta et Sacramentalia petere, maxime si alii ministri desint, et tunc excommunicatus requisitus potest eadem ministrare neque ulla tenetur obligatione causam a requirente percontandi.*

§ 3. *Sed ab excommunicatis vitandis necnon ab aliis excommunicatis, postquam intercessit sententia condemnatoria aut declaratoria, fideles in solo mortis periculo possunt petere tum absolutionem sacramentalem ad normam can. 882, 2252, tum etiam, si alii desint ministri, cetera Sacramenta et Sacramentalia.*

ACTIVE USE OF THE SACRAMENTS AND SACRAMENTALS

According to Canon 2261, an excommunicate, whether a *vitandus* or a *toleratus*, is forbidden to celebrate the Holy Sacrifice of the Mass, to administer the sacraments and to prepare and administer the sacramentals. From the Decretals, it is clear that excommunicates were forbidden not only to celebrate Mass and administer the sacraments, but also to perform any ecclesiastical or sacred function whatever.¹

The canon employs the term *licite*. Hence, were an excommunicate, despite the grave prohibition contained

¹ C. 3, 4, 5, 6, 10, X, *de clerico excom.* V, 27.

in the canon, to celebrate Mass or to administer a sacrament, he would act validly. The reason is obvious: for the most part, the validity of a sacrament depends on the power of orders, which cannot be lost by an ecclesiastical punishment. We have said, *for the most part*, for the Sacrament of Baptism can be validly administered by anyone having the use of reason, and the contracting parties themselves are the ministers of the Sacrament of Matrimony. Besides the power of orders, there is required for the valid administration of the Sacrament of Penance, the power of jurisdiction. The *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been issued are not possessed of the power of jurisdiction.² Hence sacramental absolution imparted by such excommunicates is invalid, except when the recipient is in danger of death, or when there is question of common error. In the former case, the *vitandi* and the *tolerati* receive jurisdiction *a jure*.³ In the latter case, the Church supplies the jurisdiction.⁴

There is no doubt but that the Church, which has full control of the sacramentals, could prohibit their preparation and administration by excommunicates under pain of nullity.⁵ The Church, however, has not seen fit to do so. The preparation or administration of the sacramentals by those under ban of excommunication is illicit, but not invalid.

Like all rules, the one prohibiting the active use of the sacraments and sacramentals to excommunicates has its exceptions. It has ever been the desire of the Church that those who have been expelled from the communion of the faithful by the censure of excommunication come as soon as possible to a realization of a sense of duty, obtain absolution from the censure and once again participate in the incalculable blessings of the Christian society. This is the very aim and purpose for which the

² Can. 2264.

³ Can. 882.

⁴ Can. 209.

⁵ Cappello, *De Censuris*, n. 148.

Church places one under ban of excommunication. Yet the Church has never meant by her legislation to favor those whom she found necessary to expel from the communion of the faithful. As was remarked before, the distinction between the *tolerati* and the *vitandi* was introduced in favor of the faithful and not to benefit excommunicates. In like manner, the relaxations which the Church has made in the law forbidding the active use of the sacraments and sacramentals to excommunicates were granted in favor of the faithful. The Church does not desire that the spiritual welfare of her children should suffer by the malice of those to whom she has entrusted the dispensation of her spiritual goods.

When mention is made in the following paragraphs of the licit administration of the sacraments, reference is had to the licitness of the act only by reason of the censure. It is evident that the administration of a sacrament by one in mortal sin cannot be licit. In the cases, therefore, in which an excommunicate may licitly *ratione censuræ* administer a sacrament, he should strive as earnestly as possible to recover the state of sanctifying grace by an act of perfect contrition.

Under the pre-Code law,⁶ the cases in which an excommunicate licitly administered the sacraments were probable ignorance on the part of the excommunicate,⁷ extreme necessity on the part of the recipient, or grave inconvenience on the part of the censured minister.⁸ With the exception of these cases, the administration of the sacraments was not permitted to the *vitandi*, although such administrations would be valid, except, of course, the administration of the Sacrament of Penance. Even the latter would be valid at the moment of death and in the case of common error. The *tolerati* could licitly administer the sacraments when they were asked to do so by the faithful. There were penalties attached to the

⁶ Cf. Suarez, *De Censuris*, disp. XI, s. 1; Wernz, VI, n. 190.

⁷ C. 9. X, *de clerico excom.* V, 27.

⁸ C. 6, C. 11, q. 32; c. 40. C. XXIX, q. 1; Conc. Trid. Sess. XIV, *de Poenit.* cap. 4, 7.

violation of this effect of excommunication. An irregularity was incurred by violating the censure,⁹ and in some cases there were vindictive penalties of privation of benefice and deposition.¹⁰ At one time the faithful who illicitly received a sacrament from one under ban of major excommunication, and after the Constitution "*Ad vitanda*" those who illicitly received a sacrament from a *vitandus* incurred minor excommunication. According to the Constitution "*Apostolicae Sedis*," one who received an Order from a *vitandus* was *ipso facto* suspended from the exercise of that Order.¹¹

The same solicitude of the Church that the spiritual welfare of the faithful be not impeded by the malice of those to whom she has committed the dispensation of her spiritual benefits is manifested in § 2 and § 3 of Canon 2261. After stating the general principle that excommunicated persons are forbidden the active use of the sacraments and sacramentals, the canon adds "*salvis exceptionibus quae sequuntur.*"

Fideles, salvo praescripto § 3, possunt ex qualibet justa causa ab excommunicato Sacramenta et Sacramentalia petere, maxime si alii ministri desint, et tunc excommunicatus requisitus potest eadem ministrare neque ulla tenetur obligatione causam a requirente percontandi. (2261, § 2.)

Canon 2261, § 2 has reference to petitioning the sacraments and sacramentals from excommunicates who are neither *vitandi*, nor *tolerati* against whom any sentence, either declaratory or condemnatory, has been issued. They will be spoken of as the *simpliciter tolerati*. For any just reason, the faithful may request a *simpliciter toleratus* to administer the sacraments and sacramentals, especially when there are no other ministers available. When so requested, the excommunicate may administer the sacraments and sacramentals and he is not obliged

⁹ C. 10, X, *de clerico excom.*, V, 27.

¹⁰ C. 3, 4, 6, X, *de clerico excom.*, V, 27.

¹¹ § V, 6, (*Fontes*, n. 552); cf. c. 2, X, *de ordinatis ab Epis.* I, 13.

to inquire why the petitioner wishes to receive them. The principle reason for which the faithful may ask the sacraments and sacramentals from a *simpliciter toleratus* is the absence of other ministers. However, it is not the only reason; any just cause will suffice; a grave cause is not required. As examples of just causes which will permit the faithful to request the sacraments and sacramentals from a *simpliciter toleratus* may be mentioned, the earlier conferring of Baptism, the dispelling of a doubt concerning the gravity of a sin, the intention of approaching Holy Communion with greater purity of soul, the intention of receiving the Holy Eucharist more frequently, etc.¹² "Any reason may be called just which promotes devotion or wards off temptations or is prompted by real convenience, for instance, if one does not like to call another minister."¹³

Canon 2261, §2 should relieve the faithful of all anxiety with regard to petitioning the *simpliciter tolerati* to administer the sacraments and sacramentals. Yet, as Vermeersch-Creusen remark, the Code, by the clause "maxime si alii ministri desint," "insinuat obligatio caritatis qua tenemur, sine nimio incommodo, ne actione nostra alium, etiam ob ejus malam voluntatem, in periculum peccati inducamur." There is question, of course, of the sin which the excommunicate would commit by celebrating Mass or administering a sacrament, unless he had recovered the state of sanctifying grace by an act of perfect contrition.¹⁴

In order that a *simpliciter toleratus* may licitly celebrate Mass, administer the sacraments and prepare and administer the sacramentals, he must be requested to do so (*requisitus*). It is not necessary, however, that the request be explicit. Almost all authors teach that an implicit or reasonably presumed petition suffices.¹⁵ Such

¹² Vermeersch-Creusen, *Epitome*, III, n. 463; cf. Cocchi, *Commentarium*, VIII, n. 87.

¹³ Augustine, *Commentary*, VIII, p. 182.

¹⁴ *Epitome*, III, n. 463.

¹⁵ Suarez, *De Censuris*, disp. XI, s. 4; Vermeersch-Creusen, *Epitome*, III, n. 463; Cappello, *De Censuris*, n. 148; Cocchi, *Commentarium*, VIII, n. 87; Sole, *De Delictis et Poenis*, n. 220.

a petition is had whenever the good of souls demands the celebration of Mass, the administration of the sacraments, or the preparation or administration of the sacramentals and there is present no other minister besides a *simpliciter toleratus*.¹⁶ Hence, such an excommunicate may show himself ready to hear confessions on Saturdays and vigils of feasts, to distribute Holy Communion even on week-day mornings, to celebrate Mass on Sundays and Holydays, and it would seem in these days of daily attendance at Mass, even on days throughout the week. All of this, of course, presupposes that such a course of action does not result in scandal, which, it may be added, would seldom be the case with regard to a *simpliciter toleratus*.

Sed ab excommunicatis vitandis necnon ab aliis excommunicatis, postquam intercessit sententia condemnatoria aut declaratoria, fideles in solo mortis periculo possunt petere tum absolutionem sacramentalem ad normam can. 882, 2252, tum etiam, si alii desint ministri, cetera sacramenta et sacramentalia. (2261, § 3.)

It has been seen that for any just reason the faithful may request the *simpliciter tolerati* to administer the sacraments and sacramentals. Canon 2261, § 3 states when and under what circumstances the faithful may request the administration of the sacraments and sacramentals at the hands of the *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been passed. It states that the faithful, only when they are constituted in danger of death, may request such excommunicates to impart sacramental absolution in accordance with Canons 882 and 2252, and also, if no other ministers are present, to administer the other sacraments and sacramentals.

There are three points to be noted in § 3 of Canon 2261. In the first place, only when they are in danger

¹⁶ Cappello, *De Censuris*, n. 148.

of death may the faithful request the *vitandi* and the *tolerati post sententiam* to administer a sacrament or sacramental. Secondly, they may petition sacramental absolution of them in accordance with Canons 882 and 2252. Finally, they may request them to administer the other sacraments (that is, besides Penance) and sacramentals only when no other ministers are present.

In solo mortis periculo.

Only when they are in danger of death, may the faithful request the *vitandi* and the *tolerati* against whom a sentence has been passed to administer a sacrament or sacramental. In the first place a distinction must be made between the *articulus mortis* and the *periculum mortis*. The former is had when death is already morally certain, or imminent and inevitable; the latter is present whenever it is prudently feared that death may ensue.¹⁷ It would seem, however, that at the present time the terms *articulus mortis* and *periculum mortis* have the same force in law.¹⁸

The danger of death may arise from any cause whatsoever. It may arise from an intrinsic cause, such as disease, wound, old age, etc.; it may be brought about by an extrinsic cause, such as war, surgical operation, difficult journey, sentence of judge, etc. A norm for judging when the danger of death may be said to be present will be found in the declaration of the Sacred Penitentiary of March 18, 1912, and May 29, 1915.¹⁹ This declaration was to the effect that soldiers mobilized for war were to be looked upon as in danger of death without further question whether they were to be sent into battle immediately.

In order to make use of a faculty granted only for danger of death, it suffices that the priest prudently judge that the person in whose favor the faculty is to be

¹⁷ Cappello, *De Sacramentis*, II, n. 408.

¹⁸ Cappello, *op. et loc. cit.*; Genicot-Salsmans, *Institutiones Theologiae Moralis*, II, n. 332; Kelly, *The Jurisdiction of the Simple Confessor*, p. 77.

¹⁹ *AAS*, VII, p. 282.

used is in danger of dying. When there is a positive and prudent doubt whether the person is really constituted in danger of death, the faculty can be employed validly and licitly, for in this case the Church supplies jurisdiction according to Canon 209. If the priest erroneously judges that the person is in danger of death when in reality he is not, the use of the faculty is valid by virtue of the same canon.

*Fideles in solo mortis periculo possunt petere * * * absolutionem sacramentalem ad normam can. 882, 2252.*

Only when they are in danger of death, may the faithful seek sacramental absolution from the *vitandi* and the *tolerati* against whom a sentence has been passed. Ordinarily such excommunicates are without the power of jurisdiction necessary for imparting sacramental absolution.²⁰ However, by virtue of Canon 882, when there is question of danger of death, all priests, even though not approved for hearing confessions, validly and licitly absolve all penitents from all sins and censures, howsoever they are reserved and notorious, even if there is present a priest approved for hearing confessions.²¹ No priest is excluded from the faculty granted by Canon 882. "Anyone who has been validly ordained a priest and thereby possesses the power of orders receives the necessary power of jurisdiction for granting absolution from any sin or censure from this canon, as long as the penitent is in danger of death."²² Hence, when a person is in danger of death, a *vitandus* or a *toleratus post sententiam* can validly and licitly impart sacramental absolution, even though there is present an approved priest.

When they are in danger of death, the faithful may petition sacramental absolution of a *vitandus* or a *tol-*

²⁰ Can. 2264, 873, § 3.

²¹ Salvo praescripto can. 884: "Absolutio complicitis in peccato turpi invalida est, praeterquam in mortis periculo; et etiam in periculo mortis, extra casum necessitatis, est ex parte confessorii illicita ad normam constitutionum apostolicarum et nominatim constitutionis Benedicti XIV *Sacramentum Poenitentiae*, 1 Jun. 1741.

²² Kelly, *The Jurisdiction of the Simple Confessor*, p. 78.

eratus post sententiam, even if there is present an approved priest, or one not laboring under censure. Of course, it stands to reason that a priest approved for hearing confessions, or one not laboring under censure, should always be preferred to excommunicates, especially to such excommunicates as are now in question. However, if the faithful have any reasonable cause for seeking absolution from a *vitandus* or a *toleratus post sententiam* in preference to an approved priest or one in good standing, they may do so.

Canon 2252 is to the effect that when a penitent in danger of death is absolved from a censure *ab homine*, or a censure reserved *specialissimo modo* to the Holy See, by one who ordinarily has not faculties to absolve from such censures, the penitent is obliged, after he has recovered, under penalty of incurring the censure, to have recourse to the one who imposed the censure, if there is question of a censure *ab homine*, or in the case if a censure reserved *specialissimo modo* to the Holy See, to the Sacred Penitentiary or to one having faculties to absolve from such a censure, and the penitent after making the recourse is bound to obey the mandates of the superior.²³

*Fideles in solo mortis periculo possunt petere * * * si alii desint ministri, cetera sacramenta et sacramentalia.*

The faithful, when they are in danger of death, may request the *vitandi* and the *tolerati post sententiam* to administer the other sacraments (that is, besides Penance) and sacramentals, only if no other ministers are present. Prior to the Code, it was disputed what sacraments the *vitandi* could administer to a dying person. It was admitted by all that they could administer the Sacraments of Baptism and Penance, since these sacraments are of the greatest necessity. Many writers held that they could and should administer Holy Eucharist

²³ Cf. Pont. Comm. ad CC. auth. interpret., 12 Nov. 1922, ad VIII (AAS, XIV, 663).

or Extreme Unction in cases in which the dying person could not confess. The reason for this opinion is given by Schmalzgrueber: "Cum sacramentum ex attrito facere possit contritum, continget aliquando, ob receptionem Eucharistiae vel Extremae Unctionis, obtinere salutem, quae non obtineretur, praedictis sacramentis non receptis." ²⁴

Could the *vitandi* administer other sacraments to a dying person who had received sacramental absolution? Here again authors disagreed. Suarez, ²⁵ however, taught that in such cases they could administer the Holy Eucharist. He argued that although in such cases the Holy Eucharist was not necessary *necessitate medii*, nevertheless it was of the greatest necessity to enable the dying person to overcome the wiles of the evil one, and it could reasonably be presumed that the Church did not wish to deprive the dying person of so great a benefit. Moreover, it might happen that for some reason or other the dying person did not recover sanctifying grace in the Sacrament of Penance, which he might recover by receiving the Holy Eucharist in good faith. It was generally held that the other sacraments could not be administered by the *vitandi*, even to a person in danger of death. ²⁶ Some allowed the *vitandi* to assist at marriages in certain very urgent cases. ²⁷

The Code has put an end to all controversy in this matter. When they are in danger of death, the faithful may ask the other sacraments (that is, besides Penance) and sacramentals from the *vitandi* and the *tolerati post sententiam*, if no other ministers are present. The Code makes no exception. If no other ministers are present,

²⁴ Pars IV, tit. XXXIX, n. 145. Cf. Suarez, *De Censuris*, disp. XI, s. 1, n. 23.

²⁵ *De Censuris*, disp. XI, s. 1, n. 17-18; cf. Navarrus, *De Sacramentis in genere*, cap. 22, n. 4; S. Alphonsus, *Theologia Moralis*, VI, n. 88.

²⁶ Cf. S. Alphonsus, *Theologia Moralis*, VI, n. 88; Lehmkuhl, *Theologia Moralis*, 5 ed., II, n. 53; Genicot-Salmons, *Institutiones Theologiae Moralis*, 7 ed., II, n. 130; Aertnys, *Theologia Moralis*, 3 ed., II, n. 27; Smith, *Elements of Ecclesiastical Law*, III, n. 3201.

²⁷ Suarez, *De Censuris*, disp. XI, s. 1, n. 24; S. Alphonsus, *Theologia Moralis*, VI, n. 88.

the faithful may petition such excommunicates to administer any sacrament or sacramental which they are capable of receiving validly and licitly. Hence they may request Holy Viaticum and Extreme Unction, even though they have received sacramental absolution; they may petition Holy Viaticum even though they have received Holy Communion the same day; they may ask a bishop to confer upon them the Sacrament of Confirmation, etc.

The faithful when constituted in danger of death may seek sacramental absolution of the *vitandi* or the *tolerati post sententiam* even if another priest is present. However, they can petition the other sacraments and sacramentals only “*si alii desint ministri.*” This last clause has been translated, “if no other ministers are present.” A secondary meaning of the term “*deesse*” is “to be absent,” “not to be present.” “Hence by a benign though legitimate interpretation” the *vitandi* and the *tolerati post sententiam* may administer all the sacraments when there is danger of death, if no other ministers are present. “This interpretation is justified by the psychological condition of the sick person [or one otherwise in danger of death] and affords another proof of the kindness of the Church.”²⁸

§ 3 grants the faithful permission under certain circumstances to ask the *vitandi* and the *tolerati post sententiam* to administer the sacraments and sacramentals. In all cases in which they are legitimately requested to do so, such excommunicates administer the sacraments and sacramentals not only validly, but licitly as well (*ratione censurae*). However, it is not necessary that the petition on the part of the faithful be explicit. Thus when no other priests are present, an excommunicated priest should do all in his power to aid a dying person, even though not requested explicitly to do so.

Those who presume to receive orders from one against whom a declaratory or condemnatory sentence of excom-

²⁸ Augustine, *Commentary*, VIII, p. 183.

munication has been issued *ipso facto* contract suspension *a divinis*, reserved to the Holy See. Those who are ordained in good faith by such a one are to be without the exercise of the order thus received until they are dispensed.²⁹

II. THE SACRAMENT OF MATRIMONY

As regards the other sacraments, so, too, the reception of the Sacrament of Matrimony is forbidden to excommunicated persons. Consequently one who receives the Sacrament of Matrimony while under ban of excommunication sins gravely.

It is now theologically certain that the ministers of the Sacrament of Matrimony are the contracting parties themselves. While the contracting parties, in so far as they are the recipients of the Sacrament, are bound *sub gravi* to be in the state of grace, in so far as they are the ministers of the Sacrament, the obligation to be in the state of grace seems to bind only *sub levi*.³⁰

Probably one who contracts marriage with another whom he knows to be in mortal sin does not sin by cooperation. Christian marriage follows the nature of contracts. One is permitted for any notable cause to enter into a contract with a person whom he foresees will thereby sin *e propria malitia*.³¹ Nor does the prohibition of administering a sacrament to the unworthy stand in the way, even if the other party to the contract is under ban of excommunication. The position of the minister in the Sacrament of Matrimony differs very much from that of the minister in the other sacraments. In the latter, the minister acts as a public person who is obliged by his very office to attend to the merits and demerits of the recipients, lest he become an unfaithful dispenser; in the Sacrament of Matrimony, on the con-

²⁹ Can. 2372; cf. *supra*, p. 73; *infra*, pp. 165-166.

³⁰ Genicot-Salsmans, *Institutiones Theologiae Moralis*, 10 ed., II, n. 115; Cappello, *De Sacramentis*, III, n. 37; Wernz-Vidal, *Jus Canonium*, V, n. 202.

³¹ Genicot-Salsmans, II, n. 464; I, n. 233.

trary, the minister is a private person entering into a contract and hence he attends only to his own utility.³² Genicot-Salsmans remark, however, that it seems to be a grave sin to contract marriage with a *vitandus*.³³

1. Assistance at Marriage

Assistance at marriage entails neither the administration of a sacrament, nor an exercise of the power of jurisdiction. It is very closely allied, however, to the latter, because the right to assist at marriage is acquired by virtue of an office and because the right can be delegated.³⁴ Since, however, assistance at marriage is likewise very closely connected with the administration of the sacraments, it was thought more advisable to treat of the few points which bear upon the subject of this dissertation in connection with the administration of the sacraments than with the exercise of the power of jurisdiction. Two points will be discussed. The first will concern assistance at the marriage of notoriously excommunicated persons. The second will treat of assistance at marriage on the part of excommunicated priests.

(A) Assistance at the Marriage of Notorious Excommunicates

CANON 1066.

Si publicus peccator aut censura notorie innodatus prius ad sacramentalem confessionem accedere aut cum Ecclesia reconciliari recusaverit, parochus ejus matrimonio ne assistat, nisi gravis urgeat causa, de qua, si fieri possit, consulat Ordinarium.

Canon 1066 states that if a public sinner, or one notoriously under ban of censure, refuses first to approach sacramental confession or to be reconciled with the Church, the pastor is not to assist at his marriage, unless a grave cause urges, concerning which, if possible,

³² Genicot-Salsmans, II, n. 464.

³³ *Ibidem*, not. 1.

³⁴ Cappello, *De Sacramentis*, III, n. 649.

he is to consult the Ordinary. Our commentary on this canon will be confined to assistance at the marriages of persons who are notoriously under ban of excommunication.

Persons who are notorious excommunicates are enumerated among the *indigni*. In the first place, it is to be noted that the legislation takes cognizance only of notorious excommunicates. If the fact that a person is under ban of excommunication is known only through the confessional, it cannot be taken into consideration in the external forum. If although known outside the confessional, a person's excommunication remains occult, the pastor is obliged to warn such a one privately of the obligation of becoming reconciled with the Church, unless, of course, the pastor prudently judges that it is more expedient to abstain from admonition.³⁵ However, the pastor can and must assist at the marriage of such a person.³⁶

The censure of excommunication may be notorious by notoriety either of law or of fact. It is notorious by notoriety of law after a declaratory or condemnatory sentence. It is notorious by notoriety of fact when a delict, which is publicly known to be punished by excommunication, is committed under such circumstances that it cannot be concealed by any artifice or excused by any subterfuge of law.³⁷ Notoriety either of law or of fact suffices to bring an excommunicate under the legislation of Canon 1066.³⁸

Before being admitted to contract marriage, a notorious excommunicate must first be reconciled with the Church, that is, he must obtain absolution from the censure. A censure is a vinculum of the external forum. Hence *per se* it must be removed in that forum. Absolution granted in the external forum affects both forums.

³⁵ Wernz-Vidal, *Jus Canonium*, V, n. 202; Ayrinhac, *Marriage Legislation in the New Code*, p. 132.

³⁶ Wernz-Vidal, *loc. cit.*; Cappello, *De Sacramentis*, III, n. 332; DeSmet, *De Sponsalibus et Matrimonio*, n. 194.

³⁷ Can. 2197.

³⁸ DeSmet, *De Sponsalibus et Matrimonio*, n. 195, not. 5.

However, when absolution has been obtained in the internal forum, one may, if scandal is removed, conduct himself as absolved even in the external forum, but unless the absolution is proved or at least legitimately presumed in the external forum, the censure can be enforced by the superior having jurisdiction in the external forum, and the censured one is obliged to obey.³⁹ However, in cases in which absolution in the internal forum can be legitimately presumed, the superior of the external forum can accept such an absolution for the external forum also.⁴⁰

Wernz-Vidal are of the opinion that notorious excommunicates are to be dealt with in the same manner as public sinners, that is, they must approach sacramental confession, "dum non constat per absolutionem a censura fuisse cum Ecclesia reconciliatum."⁴¹ To preclude the danger of scandal, it is always required that the fact of reconciliation be established by an act publicly posited, or by the divulgation of such an act.⁴²

If a notorious excommunicate refuses to be reconciled with the Church, the pastor is not to assist at his marriage, unless a grave cause urges, concerning which, if it is possible, he is to consult the Ordinary. Assistance at the marriage of such a person is not intrinsically evil; hence it can be permitted for proportionately grave causes. Among grave causes which would permit assistance at such marriages may be mentioned the following: if the parties have already contracted marriage civilly, or there is danger that they might do so; if it is very difficult for the innocent party to relinquish the marriage; or generally, if all things considered, greater evils would follow upon a refusal to assist at such a marriage.⁴³ Practically all authors demand a much graver

³⁹ Can. 2251.

⁴⁰ Cocchi, *Commentarium*, VIII, n. 76; Cappello, *De Censuris*, n. 98; Sole, *De Delictis et Poenis*, n. 185.

⁴¹ *Jus Canonicum*, V, n. 202.

⁴² *Ibidem*.

⁴³ Cf. Wernz-Vidal, Cappello, DeSmet, *loc. cit.*

cause to permit assistance at the marriage of an excommunicate who is a *vitandus* or a *toleratus* against whom a declaratory or condemnatory sentence has been issued.⁴⁴ Gasparri, Chelodi and Cappello require a *causa gravissima* to permit assistance at the marriage of a *vitandus*.⁴⁵

(B) *Assistance at Marriage by Excommunicated Priests*

CANON 1095.

§ 1. *Parochus et loci Ordinarius valide matrimonio assistunt:*

1.° * * * *nisi per sententiam fuerint excommunicati* * * * *aut tales declarati.*

§ 2. *Parochus et loci Ordinarius qui matrimonio possunt valide assistere, possunt quoque alii sacerdoti licentiam dare ut intra fines sui territorii matrimonio valide assistat.*

It has been pointed out that the right to assist at marriages is very similar to the exercise of the power of jurisdiction; it is obtained by virtue of an office and it can be delegated to others. It has another likeness to the power of jurisdiction. In ordinary circumstances, acts of jurisdiction cannot validly be placed by persons against whom a declaratory or condemnatory sentence of excommunication has been issued.⁴⁶ In like manner, a pastor and local Ordinary cannot validly assist at marriage after a declaratory or condemnatory sentence of excommunication (“*per sententiam fuerint excommunicati* * * * *aut tales declarati.*”)⁴⁷ It is to be noted that if a pastor or local Ordinary should unfortunately become a *vitandus*, he would *ipso facto* be deprived of his

⁴⁴ Gasparri, *De Matrimonio*, n. 536; Chelodi, *Jus Matrimoniale*, n. 67; Cappello, *De Sacramentis*, III, n. 332; Wernz-Vidal, *Jus Canonium*, V, n. 202; Farrugia, *De Matrimonio et Causis Matrimonialibus*, n. 142.

⁴⁵ *Loc. cit.*

⁴⁶ Can. 2264.

⁴⁷ Can. 1095, § 1, n. 1.

office as pastor or Ordinary and consequently could not validly assist at marriages.⁴⁸

An excommunicated pastor or local Ordinary, against whom no sentence has been issued, can assist validly at marriages, provided, of course, that all the other requisites mentioned in Canon 1095, § 1, nn. 1, 2, 3, are verified. Can such a one do so licitly? It would seem that he cannot. Assistance at marriage, it is true, does not constitute an administration of a sacrament, still it does entail active use of the sacramentals, which is forbidden to all excommunicates by virtue of Canon 2261. In this, as in all similar cases, however, the provisions of Canon 2232 must be borne in mind: before a declaratory sentence, one is not obliged to observe a *latae sententiae* penalty, whenever he cannot do so without loss of good repute.

The pastor and local Ordinary who can validly assist at marriage can likewise give permission to another priest to assist validly at marriage within their territory.⁴⁹ It is to be noted that Canon 1095, § 2 states explicitly that permission can be given by the pastor and local Ordinary "*qui matrimonio possunt valide assistere.*" Since the pastor and local Ordinary against whom a declaratory or condemnatory sentence has been passed cannot validly assist at marriage, they cannot validly grant permission to another priest to do so. This is evidently the meaning of Canon 1095, § 2, and is the opinion commonly accepted by canonists.⁵⁰ This view-point is in accordance with the principle: *Nemo potest plus juris transferre in alium quam sibi competere dignoscatur.*⁵¹

Can a pastor or local Ordinary give permission to assist at marriage to a priest against whom a declaratory or condemnatory sentence of excommunication has been

⁴⁸ Can. 2266.

⁴⁹ Can. 1095, § 2.

⁵⁰ Wernz-Vidal, *Jus Canonium*, V, n. 538; Cappello, *De Sacramentis*, III, n. 673; Chelodi, *Jus Matrimoniale*, n. 133; Vlaming, *Praelectiones Juris Matrimonii*, n. 572; Linneborn, *Grundriss des Eherechts nach dem C. J. C.*, p. 321; Petrovits, *The New Church Law on Matrimony*, n. 468.

⁵¹ Reg. 79, *Regulae Juris* in VI°.

passed? In the first place, no pastor or local Ordinary can do so *licitly*, for no excommunicate can licitly assist at marriage, since it entails active use of the sacramentals.⁵² It would seem that a pastor or local Ordinary cannot do so even *validly*.⁵³ It is the common teaching of canonists that the delegated priest, similar to the pastor and local Ordinary, must not be forced to assist by grave violence or fear and that he must ask and receive the consent of the contracting parties; furthermore, a delegated priest cannot validly assist at marriage outside the territory of the pastor or Ordinary who delegates him.⁵⁴ *A pari*, therefore, it would seem that a delegated priest who is a *post sententiam* excommunicate cannot validly assist at marriage. Moreover, under the *Ne Temere* legislation, the delegated priest, in order to assist validly and licitly, was obliged to observe the limits of his mandate and the rules laid down for valid and licit assistance on the part of the pastor and Ordinary.⁵⁵ Hence, a delegated priest who had been nominally excommunicated in a public decree could not validly assist at marriage. It would seem that under the discipline of the Code, the rules laid down for valid assistance on the part of the pastor and Ordinary must be observed by a delegated priest, although the Code does not expressly say so.⁵⁶

Vlaming, however, maintains that immunity from censure according to Canon 1095, § 1, n. 2 is not required in the delegated priest. He writes: "Immunitas a censura, ad normam can. 1095, § 1, 2° requiritur quidem in delegante, ceu teste qualificato *ordinario*, sed nullibi in delegato, qui est testis qualificatus *extra-ordinarius*, ideoque paritate cum illo carens."⁵⁷ Petrovits embraced this

⁵² Can. 2261.

⁵³ DeSmet, *De Sponsalibus et Matrimonio*, n. 122; Vermeersch-Creusen, *Epitome*, II, n. 396; Linneborn, *Grundriss des Eherechts nach dem C. J. C.*, p. 321.

⁵⁴ Cf. Can. 1095, § 1, n. 2, 3.

⁵⁵ *Decretum Ne Temere*, IV, V, VI.

⁵⁶ DeSmet, *De Sponsalibus et Matrimonio*, n. 122.

⁵⁷ *Praelectiones Juris Matrimonii*, n. 573, not. 2.

opinion in the first edition of his work.⁵⁸ He rejects it, however, in his second edition. Without making any reference to validity or invalidity, he states that such a priest *may* not be delegated "nor may he presume to perform such an act except for one who is in danger of death *et alii desint ministri*."⁵⁹

Concerning this question there would seem to be a doubt of law (*dubium juris*).

2. Matrimonial Dispensations

It will be necessary to touch upon a few points relative to matrimonial dispensations. The granting of a dispensation is an exercise of the power of jurisdiction. Hence, ordinarily, the granting of matrimonial dispensations should be considered under Canon 2264. However, to maintain unity of subject, it was deemed more advisable to discuss the granting of matrimonial dispensations by excommunicates in this place. Two points will be discussed. The first will concern the *vitandi* and the *tolerati post sententiam* as the confessor of Canon 1044. The second point will bear upon the same classes of excommunicates as the priest who assists at marriage in virtue of Canon 1098, n. 2.

(A) *The Vitandi and the Tolerati post sententiam as the Confessor of Canon 1044*

Since even the *vitandi* and the *tolerati post sententiam* may hear the confession of any person who is in danger of death, so, too, when necessary, they may make use of the faculty of dispensing granted by Canon 1044.⁶⁰ In order better to understand the faculty granted by Canon 1044, it will be necessary to quote Canon 1043, of which Canon 1044 is but an extension. Canon 1043 states that in (urgent) danger of death, in order to soothe conscience, and, if the case warrants it, to legitimize the

⁵⁸ *The New Church Law on Matrimony*, (1921), n. 474.

⁵⁹ *The New Church Law on Matrimony*, (1926), n. 474.

⁶⁰ Cf. Cappello, *De Sacramentis*, III, n. 238; Kelly, *The Jurisdiction of the Simple Confessor*, p. 84.

offspring, local Ordinaries can dispense from the form prescribed for the celebration of marriage and likewise from all impediments of ecclesiastical law, whether they are public or occult, even if they are multiple, with the exceptions of the impediment arising from Sacred Priesthood and the impediment arising from affinity in the direct line, when the marriage has been consummated; local Ordinaries can use this faculty in favor of their own subjects wherever the subjects may be, and also in favor of all who are actually within their territory; scandal must be avoided; and if a dispensation is granted from the impediment of disparity of cult or of mixed religion, the customary promises are to be given. Under the same circumstances, and for cases in which the local Ordinary cannot be approached, Canon 1044 extends the same faculty of dispensing to the pastor, the priest who assists at the marriage in virtue of Canon 1098, n. 2, and the *confessor*; the confessor, however, can exercise this power of dispensing for the internal forum and in the act of sacramental confession only. Since Canon 1044 has no direct bearing upon the subject-matter of this dissertation, no attempt will be made to enter into an explanation of the many debatable questions that arise in connection with it. For such, the reader is referred to authors who treat specifically of the matrimonial legislation.

(B) *The Vitandi and the Tolerati post sententiam as the Priest who Assists at Marriage in Virtue of Canon 1098, n. 2*

If the pastor, or the Ordinary, or a priest delegated by either, cannot be had or approached without grave inconvenience, marriage may be contracted both validly and licitly in the presence of witnesses only: (1) when at least one of the parties is in danger of death; (2) when it is prudently foreseen that the same state of affairs (absence of competent priest) will last for a month. In either case, if another priest is at hand who is able to

be present, he ought (*debet*) to be called and assist at the marriage together with the witnesses; under the circumstances, however, the presence of the witnesses only is required for the validity of the marriage.⁶¹

Is there any *obligation* to call an excommunicated priest to assist at the marriage, if such a one is the only priest at hand? There is some division among canonists on this point. Vlaming,⁶² DeSmet,⁶³ Vermeersch-Creusen⁶⁴ and Cappello⁶⁵ are of the opinion that the obligation does not hold, if the only priest at hand is a *vitandus*. DeSmet and Cappello favor the same viewpoint with regard to the *tolerati post sententiam*. Leitner claims that there is no obligation to call in any censured priest.⁶⁶ Cerato, however, holds that the priest is to be called, even though he is excommunicated *per sententiam*.⁶⁷ Petrovits writes: "The words *alius sacerdos* permit the inference that the obligation to request the presence of a priest would not be removed even if the parties were constrained to use the services of one who is excommunicated * * *."⁶⁸ Augustine says that the priest spoken of in Canon 1098, n. 2, "may be any priest, even one under censure."⁶⁹

Certainly the opinion of such canonists as Vlaming, DeSmet, Cappello, Vermeersch-Creusen and Leitner constitutes sufficient authority to free the parties from the obligation, light as it is, imposed by Canon 1098, n. 2, of calling in a *vitandus*. Hence, when the only priest

⁶¹ Canon 1098, nn. 1, 2. This canon is to be understood as referring only to the physical absence of the pastor or local Ordinary. Pont. Comm., March 10, 1928, (*AAS*, XX, p. 120).

⁶² "Conditio non videtur urgere * * * probabilis si, qui praesto habetur sacerdos, sit excommunicatus vitandus." *Praelectiones Juris Matrimonii*, n. 586.

⁶³ "Dicitur: alius sacerdos, sine ulla restrictione; merito tamen dices quod, si nupturientes, attento can. 2261, § 3, possent, non tamen deberent recurrere ad sacerdotem qui, per sententiam sit excommunicatus." *De Sponsalibus et Matrimonio*, n. 134, not. 1.

⁶⁴ *Epitome*, II, n. 406.

⁶⁵ *De Sacramentis*, III, n. 696.

⁶⁶ *Lehrbuch des katholischen Eherechts*, p. 207.

⁶⁷ *Matrimonium a Codice Juris Canonici integre Desumptum*, n. 95.

⁶⁸ *The New Church Law on Matrimony*, n. 501.

⁶⁹ *Commentary*, V, p. 925.

available is a *vitandus*, *per se* the parties are not obliged to call upon him to assist at the marriage. Most likely the same should be held with Cappello and DeSmet with regard to the *tolerati post sententiam*. After all, the Code, in the canons treating of the effects of excommunication, points out rather clearly that the proper distinction to make in these matters is not between the *tolerati* and the *vitandi*, but rather between the *simpliciter tolerati* on the one hand and the *vitandi* and the *tolerati post sententiam* on the other.

Thus far, the discussion has been whether a *vitandus* or a *toleratus* against whom a declaratory or condemnatory sentence has been passed *must* be called upon to assist at a marriage in conformity with Canon 1098, n. 2. The question now arises whether such a priest *may* be called upon to do so, when no other priests are available. It is certain that when one of the parties is in danger of death, such a priest may be called upon to assist at a marriage in order to bless it and to administer the other sacramentals that have place in the Catholic celebration of marriage.⁷⁰

May such excommunicates be called upon to assist at a marriage in the other case that comes under Canon 1098, that is, when it is prudently foreseen that a competent priest will not be had for a month? It would seem that they may not. Canon 2261, § 3 states explicitly that the faithful may request the *vitandi* and the *tolerati post sententiam* to administer the other sacraments (besides Penance) and sacramentals only in danger of death when no other ministers are present. In the case under consideration, there is no question of danger of death, hence Canon 2261, § 3 cannot be invoked. Furthermore, there is no notable spiritual necessity or utility that would justify assistance at marriage on the part of such priests.⁷¹

⁷⁰ Can. 2261, § 3. Cf. Cerato, *Matrimonium a Codice Juris Canonici integre Desumptum*, n. 98; Leitner, *Lehrbuch des katholischen Eherechts*, p. 207.

⁷¹ Cf. can. 1095, § 1, n. 1.

The priest who assists at a marriage in virtue of Canon 1098, n. 2, is granted certain powers of dispensing. Thus, in (urgent) danger of death, and for cases in which the local Ordinary cannot be approached, for the sake of conscience, and, if the case warrants it, for the legitimation of offspring, he can dispense from the prescribed form and also from all impediments of ecclesiastical law, whether they are public or occult, even if they are multiple, with the exception of the impediment arising from Sacred Priesthood and the impediment arising from affinity in the direct line, when the marriage has been consummated; scandal must be removed; if a dispensation is granted from the impediment of disparity of cult or of mixed religion, the customary promises are to be given.⁷² Furthermore, whenever an impediment is discovered only after everything has been prepared for the marriage, and the marriage cannot be delayed without danger of grave evil, he can dispense from all the above-mentioned impediments, but only for occult cases, that is, impediments *de facto* occult, whatever their nature may be,⁷³ in which the local Ordinary cannot be approached, or only with danger of violating the secret.⁷⁴ Under the same circumstances, this faculty avails for the convalidation of a marriage already contracted.⁷⁵

To grant a dispensation is an exercise of the power of jurisdiction. According to Canon 2264, the *vitandi* and the *tolerati post sententiam* cannot validly exercise the power of jurisdiction either of the internal or of the external forum. Some exceptions to this law have already been seen.⁷⁶ The question now arises whether a *vitandus* or a *toleratus post sententiam*, as the priest who assists at marriage in virtue of Canon 1098, n. 2, can make use of the faculty of dispensing granted such a priest by Canons 1044 and 1045, § 3.

⁷² Can. 1044.

⁷³ Pont. Comm., Feb. 1, 1928, (44S, XX, p. 61).

⁷⁴ Can. 1045, § 3.

⁷⁵ Can. 1045, § 2.

⁷⁶ *Supra*, p. 95, p. 106.

It seems certain that when one of the parties is in danger of death, even the *vitandi* and the *tolerati post sententiam* can make use of the faculty of dispensing granted by Canon 1044. Canon 2261, § 3 states that the faithful when in danger of death may petition the *vitandi* and the *tolerati post sententiam* to administer the other sacraments (besides Penance) and sacramentals, if no other ministers are present. True it is, in the cases which come under Canon 1098, abstracting, of course, from the presence of impediments in the cases, the presence of a priest is not required for the valid reception of the Sacrament of Matrimony; the contracting parties themselves are the ministers of the Sacrament; furthermore, the sacramentals which have place in the Catholic form of marriage are by no means necessary for the validity of the Sacrament. However, to ask a *vitandus* or a *toleratus post sententiam* to dispense from an impediment is equivalent to petitioning the administration of a sacrament, since the sacrament cannot be received, unless the impediment is removed. Hence, it seems that a *vitandus* or a *toleratus post sententiam*, who, in virtue of Canon 1098, n. 2, assists at the marriage of a person in danger of death, can make use of the faculty of dispensing granted by Canon 1044.

The question, however, presents some difficulties with regard to the other case that comes under Canon 1098, that is, when it is prudently foreseen that a competent priest will not be available for a month and the circumstances mentioned in Canon 1045, § 1 are verified. There is no question of danger of death, consequently Canon 2261, § 3 cannot be invoked, as it was in the preceding paragraph. Hence it would seem that the *vitandi* and the *tolerati post sententiam* cannot make use of the faculty of dispensing granted by Canon 1045, § 3. Canon 2264, which treats of the exercise of the power of jurisdiction by excommunicates, makes exception with regard to the *vitandi* and the *tolerati post sententiam* only for the cases which come under Canon 2261, § 3.

CHAPTER IV

INDULGENCES, SUFFRAGES, PUBLIC PRAYERS

CANON 2262

§ 1. *Excommunicatus non fit particeps indulgentiarum, suffragiorum, publicarum Ecclesiae precum.*

§ 2. *Non prohibentur tamen:*

1.° *Fideles privatim pro eo orare;*

2.° *Sacerdotes Missam privatim ac remoto scandalo pro eo applicare; sed, si sit vitandus, pro ejus conversione tantum.*

Pre-Code authors spoke of the effect of excommunication which we are about to consider as *privatio communium Ecclesiae suffragiorum*.¹ "The technical term for this effect of excommunication is '*privatio communium Ecclesiae suffragiorum*,' viz.: privation of the spiritual aids by which members of the Church assist one another in order either to atone for temporal punishments (*per satisfactionem*) or to obtain, either directly or indirectly, spiritual benefits (*per impetrationem*)."²

Suffrages may be either private or common. Private suffrages are those which are offered by the faithful in their own name; they embrace prayers, fastings, alms and other good works which are performed by the faithful in their own name, or by the ministers of the Church in their own name and as private persons.³ As we shall

¹ Schmalzgrueber, pars IV, tit. XXXIX, n. 126; Reiffenstuel, lib. V, tit. XXXIX, n. 57; Wernz, VI, n. 188.

² Augustine, *Commentary*, VIII, p. 184.

³ Cf. Sole, *De Delictis et Poenis*, n. 222; Augustine, *Commentary*, VIII, p. 184.

see more fully later, excommunicates are not deprived of a participation in private suffrages.

Common suffrages, of which alone excommunicates are deprived, are those which are offered in the name of the Church and "quae ex sacrificio Missae totius Ecclesiae nomine oblato, ex publicis ministrorum officiis et orationibus, ex publico et communi thesauro satisfactionum Ecclesiae per indulgentias Praelatorum auctoritate applicatas fidelibus provenire solent."⁴

It is clear from what has been said that the word *suffragia* was employed as a generic term to designate all the spiritual aids which accrued to the faithful from the treasury of the Church and from the prayers, good works, etc., offered in the name of the Church. Canon 2262, § 1, however, speaks separately of indulgences, suffrages and public prayers of the Church. The distinction which exists between indulgences and the other spiritual fruits derived by the faithful from the supplications of the Church is readily seen. An indulgence is a remission before God of the temporal punishment due for sins already forgiven which the ecclesiastical authority grants from the treasury of the Church to the living *per modum absolutionis* and to the departed *per modum suffragii*.⁵

Canon 2262, § 1, seems to imply that there is a distinction between suffrages and public prayers of the Church. Just in what this distinction consists is difficult to say. Some canonists have made a noble effort to show forth the distinction, but it would seem that they have not succeeded in clarifying matters. For the most part, they seem to speak of practically the same thing, first, under the name *suffragia*, and then under the title *publicae Ecclesiae preces*.

⁴ Wernz, VI, n. 188; cf. Schmalzgrueber, pars IV, tit. XXXIX, n. 126; Reiffenstuel, lib. V, tit. XXXIX, n. 57; Sole, *De Delictis et Poenis*, n. 222; Vermeersch-Oreusen, *Epitome*, III, n. 464.

⁵ Can. 911.

Cappello⁶ and Augustine⁷ consider suffrages as having special reference to the fruits of the Mass, in so far, as Cappello very well remarks, as the celebration of Mass is an action of the Church. Cerato⁸ and Sole⁹ look upon public prayers of the Church as those which are performed liturgically by sacred ministers in the name of the Church, "sive in ecclesia, sive extra ecclesiam, cum populo vel sine eo."

Perhaps Augustine is nearer the correct solution than any of the authors when he says that suffrages have reference especially to the fruits of the Mass, and to prayers and good works, such as alms and penances which are offered *by way of satisfaction*, and that the public prayers of the Church may be understood as prayers chiefly, though not exclusively, of *impetratory intercession* offered in the name of the Church.¹⁰

Prescinding from indulgences, it may be said in general that suffrages and the public prayers of the Church include within their scope all the supplications, good works, etc., of either satisfactory or impetratory merit, which are offered in the name of the Church.

Pre-Code authors were unanimous in maintaining that the *vitandi* were excluded from a participation in the common suffrages of the Church. This exclusion was of such a nature that although a minister of the Church wished to apply indulgences to them, or to offer for them public prayers, or to apply to them the fruits of the Mass, in so far as they are in the power of the Church, the applications were of no value, just as the distribution of the master's money by a servant is of no value, if made against the will of the Master.¹¹ Some were of the opinion that the common suffrages could be offered for a *vitandus* who was contrite and had recovered the state

⁶ *De Censuris*, n. 156.

⁷ *Commentary*, VIII, p. 184.

⁸ *Censuræ Vigentes*, n. 37.

⁹ *De Delictis et Poenis*, n. 222.

¹⁰ *Commentary*, VIII, p. 184. (The italics are the writer's.)

¹¹ Schmalzgrueber, pars IV, tit. XXXIX, n. 126; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 386.

of sanctifying grace.¹² Saint Alphonsus, however, characterized the negative view-point as *longe probabilior*.¹³ It was disputed among pre-Code authors whether the common suffrages could be applied to the *tolerati*. Saint Alphonsus considered both the affirmative and the negative opinions as probable.¹⁴ The former opinion was based on the Constitution "*Ad vitanda*" which permitted the faithful to communicate *in divinis* as well as *in humanis* with the *tolerati*. Furthermore, the defenders of this opinion argued, formerly it was not forbidden to offer public suffrages for occult excommunicates.¹⁵ The defenders of the negative opinion responded that the Constitution "*Ad vitanda*" was by no means meant to better the condition of the *tolerati*, and that it gave leave to the faithful to communicate only externally with the *tolerati*.¹⁶ Wernz, however, narrows down the *tolerati* who were excluded from the common suffrages to those whose excommunication was publicly known.¹⁷

The Code has put an end to the discussion. Without making any distinction between the *vitandi* and the *tolerati*, Canon 2262, § 1, states that an excommunicate has no share in the indulgences, suffrages and public prayers of the Church. Indulgences, suffrages and public prayers of the Church are within the power of the Church and hence, their concession and dispensation is dependent upon the will of the Church. The reason for this exclusion is evident from the very nature of the censure of excommunication. Excommunication places one outside the communion of the faithful, and consequently, deprives one of participation in all the benefits which accrue to the faithful by reason of this communion.¹⁸ This exclusion is such that no private application of the *suffrages* and *public prayers* of the Church is of any

¹² Cf. apud Suarez, *De Censuris*, disp. IX, s. 3, n. 1.

¹³ *Theologia Moralis*, VII, n. 163; cf. c. 28, X, *de sent. excom.* V. 39.

¹⁴ *Theologia Moralis*, VII, n. 164.

¹⁵ C. 14, X, *de sent. excom.* V, 30; cf. S. Alphonsus, *Theologia Moralis*, VII, n. 164.

¹⁶ Suarez, *De Censuris*, disp. IX, s. 3, n. 2; Wernz, VI, n. 188.

¹⁷ *Loc. cit.*

¹⁸ Cf. Sole, *De Delictis et Poenis*, n. 222.

avail. No one, of course, can apply an indulgence to another living person.¹⁹

The question now arises whether indulgences can be applied to those who died while under ban of excommunication and who have not been absolved from the censure after death. D'Annibale,²⁰ Cerato,²¹ Chelodi,²² and Pighi,²³ are of the opinion that even the departed excommunicates are deprived of a participation in indulgences.

A censure is not removed except by legitimate absolution and generally as long as a censure remains it has its effects. There is no doubt but that the Church could remove the privation of indulgences, suffrages and public prayers of the Church in the case of departed excommunicates. There seems to be no juridical basis, however, for maintaining that the Church has done so. Innocent III declared that an excommunicate who died before being absolved from the censure, even though before death he gave manifest signs of repentance and there was nothing to prevent his reconciliation with the Church, was not absolved in the eyes of the Church, and that he must be absolved after death. This was a response given to the question "*Utrum pro tali recipienda sit eleemosyna et a fidelibus sit orandum.*"²⁴ In another canon found in the Decretals of Gregory IX, the same Pontiff (Innocent III) declared that for a departed person who had incurred excommunication by communicating with an excommunicate "*nec * * * oblationes recipiendae pro eo, vel orationes Domino porrigendae, nisi quum de ipsius viventis poenitentia per evidentia signa constiterit, et juxta cujusdam constitutionis nostrae tenorem defuncto etiam absolutionis beneficium impendatur.*"²⁵ Furthermore, the Roman ritual, in the rubrics preceding the rite of absolving a departed

¹⁹ Can. 930.

²⁰ *Summula Theologiae Moralis*, I, n. 360, not. 8.

²¹ *Censurae Vigentes*, n. 37.

²² *Jus Poenale*, n. 37.

²³ *Censurae Sententiae Latae*, n. 21.

²⁴ C. 28, X, *de sent. excom.* V, 39.

²⁵ C. 38, X, *de sent. excom.* V, 39.

excommunicate, states that if an excommunicate gave sign of contrition before death, he can be absolved “*ne ecclesiastica careat sepultura sed Ecclesiae suffragiis, quatenus fieri potest, adjuvetur.*”²⁶

Hence, it would seem that, as far as the Church is concerned, the effect of excommunication by which those under its ban are deprived of a participation in indulgences, suffrages and public prayers of the Church is not removed with regard to deceased excommunicates, that is, those who even after death have not been absolved from the censure.

Cappello, however, asserts that the opinion which denies to departed excommunicates a participation in indulgences is not certain, and does not seem to be the truer one, since indulgences are granted to the deceased *per modum suffragii*.²⁷

Apropos of this discussion, it may be well to make a few remarks of practical value. Whenever possible, according to the teaching of Moral Theology and the norm laid down in the Ritual, an excommunicate who died before being reconciled with the Church should be absolved from the censure after death. The fact that an excommunicate cannot be granted the benefit of absolution after death is no reason why the faithful should neglect to pray for the repose of his soul.

Non prohibentur tamen fideles privatim pro eo orare.

The faithful are not forbidden to pray privately for excommunicates whether they are *vitandi* or *tolerati*. Although excommunicates do not communicate with God through the mediumship of the Church, yet communication with God, in so far as it can exist without the Church, is still possible for them. For this reason they are not deprived of the private suffrages and prayers of the faithful. Just as excommunicates can pray for themselves, so others can storm heaven with prayers in their behalf. Moreover, to pray for excommunicated persons

²⁶ Tit. III, cap. 4.

²⁷ *De Censuris*, n. 156.

is truly a work of mercy, just as it is a work of mercy to pray for infidels that they receive the light of faith and for sinners that they be converted from their evil ways.²⁸ The faithful may pray privately for any legitimate intention of an excommunicate.

The faithful may pray only privately (*privatim*) for excommunicates. Hence, they are forbidden implicitly to pray publicly for them. It may be said that prayers are offered privately, not only when they are offered in secret by one individual, but also when they are offered by a number in a private place. On the contrary, prayers are said to be public, when they are offered by many in a public manner and in a public place, ex. gr., in a Church, even though no sacred minister participates in them.²⁹

Non prohibentur tamen sacerdotes Missam privatim ac remoto scandalo pro eo applicare; sed, si sit vitandus, pro ejus conversione tantum.

There was much controversy among pre-Code authors concerning the application of Mass for excommunicates.³⁰ Some maintained that it was forbidden to apply Mass even privately and secretly for all excommunicates.³¹ After the publication of the Constitution "*Ad vitanda*" some authors were of the opinion that Mass could be applied secretly for the *tolerati* and that Mass could be offered for the *vitandi*, not in the name of the Church, but in the name of the celebrant.³² Scarcely anyone denied that a priest could remember even the *vitandi* in the Memento of the Mass, just as he could offer other private supplications for them; likewise, he could offer Mass indirectly for their conversion, by applying it, ex. gr., for the exaltation of the Church, for the conversion of sinners.³³ Gasparri sponsored substantially

²⁸ Cf. Sole, *De Delictis et Poenis*, n. 223.

²⁹ Cerato, *Censurae Vigentes*, n. 37. Cf. Blat, *De Delictis et Poenis*, n. 89.

³⁰ Cf. Gasparri, *De Eucharistia*, I, n. 483.

³¹ Cf. Salmanticenses, Tract. V, *De Sacrif. Missae*, Cap. II, p. II, n. 16.

³² S. Alphonsus, *Theologia Moralís*, VI, n. 309; de Lugo, *Tractatus de Eucharistia*, disp. XIX, s. X, n. 185.

³³ Gasparri, *De Eucharistia*, I, n. 483.

the same solution of the problem as is found in the Code.²⁴

Before commenting upon the portion of Canon 2262 that is now under discussion, it might be well to say a few words about the fruits of the Mass. Three fruits of the Mass may be distinguished, namely; the most special or personal fruit, the special or ministerial fruit and the general fruit. The most special or personal fruit of the Mass is that which accrues to the worthy celebrant and which cannot be wholly applied to another. The special or ministerial fruit is that which benefits the person or end for which the Mass is offered. The general fruit of the Mass is that which benefits in the first place those that minister and assist at the Holy Sacrifice and in the second place all the faithful, both living and dead, as long as there is no obstacle to their participating in this benefit.²⁵

Canon 2262, § 2, 2°, states that priests are not forbidden to apply Mass for excommunicates *privatim ac remoto scandalo*; but, if the excommunicate is a *vitandus*, Mass can be applied only for his conversion. The canon evidently has reference to *applying Mass* in the proper sense of the term, that is, offering Mass for a person or intention in such a manner that the person or intention will be benefited by the special or ministerial fruit of the Mass. Canon 809 employs the phrase *applicare Missam* and it is certain that this canon has reference to the application of the special or ministerial fruit of the Mass. Furthermore, Canon 2262 cannot have reference to the most special or personal fruit of the Mass, nor to the general fruit. If the former can be applied to another at all, there is no reason why it cannot be applied to any excommunicate. With regard to the general fruit of the Mass, excommunicates have no share in it.²⁶

In other words, a priest may offer Mass for excommunicates and their intentions, just as for other persons.

²⁴ *Op. et loc. cit.*

²⁵ Genicot-Salemans, *Institutiones Theologiae Moralis*, 10 ed., II, n. 217.

²⁶ Can. 2262, § 1.

There are two restrictions, however. The first is that Mass must be applied *privatim ac remoto scandalo*. The second is that when the excommunicate is a *vitandus*, Mass can be offered only for his conversion. Thus the Church makes known what is most necessary and what should be the first concern of the *vitandi*.⁸⁷ Since there is question here of applying the ministerial fruits of the Mass, priests may accept stipends for the Masses which are offered for excommunicates and their intentions.⁸⁸

The Mass must be applied *privatim ac remoto scandalo*. Primarily, it is the application of the Mass, that is, the intention for which the Mass is offered and not the Mass itself, or the celebration thereof, that must be private. Private application of Mass is opposed to a public application thereof. Hence, the fact that Mass is to be offered for an excommunicate or his intention cannot be made public. No announcement to this effect can be made from the pulpit, or in a parish publication, or in any other manner.

Many writers are of the opinion that the Mass which is applied for an excommunicate or his intention cannot be a Solemn Mass, or a *Missa cantata*, but must be a private or low Mass.⁸⁹ However, according to the canon, it is the application of the Mass, that is, the intention for which the Mass is offered, that must be private. It is not necessary that the Mass itself be a private one, that is, a *Missa privata*. It must be admitted, however, that the opinion of Cerato, Augustine, etc., is in strict accord with the spirit of the Church in dealing in these matters with her recalcitrant children. Hence, ordinarily, a priest must refuse to celebrate other than a private or low Mass for an excommunicate; to act otherwise would very often give rise to scandal. There are some cases, however, in which a priest would be fully justified in applying a Solemn Mass or a *Missa cantata* for an excommunicate.

⁸⁷ Cerato, *Censuræ Vigentes*, n. 37.

⁸⁸ Cf. *S. C. S. O.*, April 19, 1837, (*Fontes*, n. 876); July 12, 1865, (*Fontes*, n. 985).

⁸⁹ Ex. gr., Cerato, *Censuræ Vigentes*, n. 37; Augustine, *Commentary*, VIII, p. 185.

Take the case in which a priest is requested to offer Mass for an excommunicate and the time of the Mass is left at the disposal of the priest. There seems to be no reason why the priest may not apply for the excommunicate a Solemn Mass or a *Missa cantata* which he is obliged to sing by reason of his parish duties. In the case, the application of the Mass is private; furthermore, no scandal results from such a course of action, for, as the case supposes, not even the donor of the stipend is aware when the Mass is to be offered.

In all cases in which Mass is offered for an excommunicate, scandal must be avoided. For the most part, the law itself has taken care that no scandal will arise by stating that the application of the Mass must be private. Hence, ordinarily the only ones who might be scandalized by such a course of action are those who petition the Mass. This would very seldom be the case. However, any danger of scandal can easily be removed by a prudent explanation of the Church's legislation in this matter and the reason thereof.

It remains to say a few words concerning the application of Mass for deceased excommunicates. Mass may be applied, even publicly, for any excommunicate who was admitted to ecclesiastical burial.⁴⁰ Hence, Mass may be offered, even publicly, for the repose of the soul of a *vitandus* or a *toleratus post sententiam* who manifested signs of repentance before death, and likewise, for the repose of the soul of a *simpliciter toleratus* who departed without giving signs of repentance, for such excommunicates are not to be deprived Christian burial.⁴¹ May Mass be applied for a departed *vitandus* or *toleratus post sententiam* who died without manifesting any signs of repentance and who consequently was denied ecclesiastical sepulture? It would seem that Mass may be offered (*privatim ac remoto scandalo*) for such a *toleratus*,⁴² unless it is *certain* that he was in bad faith and died impeni-

⁴⁰ Cf. Cappello, *De Censuris*, n. 156.

⁴¹ Cf. Can. 1240, § 1, n. 2.

⁴² Cf. Cappello, *De Sacramentis*, I, n. 621.

tent. With regard to a *vitandus*, the question is rather difficult. Augustine remarks: "It is a rather venturesome interpretation to allow Mass to be said for a dead *vitandus*, i. e., one who died under such an excommunication, because the text allows it to be done only for his conversion, which after death is impossible."⁴³ Chelodi is of the opinion that Mass cannot be offered for a deceased *vitandus*.⁴⁴ Pighi asserts that Mass cannot be offered for such a one, at least publicly.⁴⁵ It is to be noted, however, that the canon under discussion does not explicitly forbid the application of Mass for a deceased *vitandus*. In fact, it makes no direct reference whatsoever to departed excommunicates. True it is, it states that Mass can be applied only for the conversion of a *vitandus* and after death there is no possibility of conversion. Yet, since the Church permits Mass to be offered for what is best for a *vitandus* in life, that is, his conversion, does it not seem unreasonable to claim that the Church forbids the application of Mass for a deceased *vitandus*? To interpret Canon 2262, § 2, n. 2, as forbidding the application of Mass for a deceased *vitandus* seems to be contrary to the rules governing penal interpretation. Since the canon speaks of applying Mass only for the conversion of a *vitandus*, a strict interpretation would lead to the conclusion that the legislator has taken into consideration only the question of applying Mass for the living *vitandus*. This conclusion would be reached by the same reason which the upholders of the negative view-point give for their opinion, namely, that after death there is no possibility of conversion. Hence, the opinion may be ventured that Mass may be offered *privatim ac remoto scandalo* for a deceased *vitandus*, unless it is *certain* that he was in bad faith and died unrepentent.⁴⁶

⁴³ *Commentary*, VIII, n. 186-187.

⁴⁴ *Jus Poenale*, n. 87.

⁴⁵ *Censurae Sententiae Latae*, n. 21.

⁴⁶ Cf. Wernz, VI, n. 188; Gasparri, *De Eucharistia*, n. 483; Ayrinhac, *Penal Legislation*, p. 124.

CHAPTER V

LEGITIMATE ECCLESIASTICAL ACTS: EXCOMMUNICATES AS PLAINTIFFS IN ECCLESIASTICAL COURTS: DISCHARGE OF ECCLESIASTICAL OFFICES: USE OF PRIVILEGES

CANON 2263

Removetur excommunicatus ab actibus legitimis ecclesiasticis intra fines suis in locis jure definitos; nequit in causis ecclesiasticis agere, nisi ad normam can. 1654; prohibetur ecclesiasticis officiis seu muneribus fungi, concessisque antea ab Ecclesia privilegiis frui.

I. LEGITIMATE ECCLESIASTICAL ACTS

Removetur excommunicatus ab actibus legitimis ecclesiasticis intra fines suis in locis jure definitos.

The Code is quite in conformity with the old law in removing excommunicates from what are now known as legitimate ecclesiastical acts.¹ Prior to the Code, this effect of excommunication was not found stated in any one canon or decree. It was scattered throughout the *Corpus Juris Canonici*. True it is, in the Decretals of Boniface VIII, there is a reference to the removal of public excommunicates from legitimate acts. It is very difficult, however, to ascertain just what were included within the scope of legitimate acts, for in the very same sentence, the canon speaks of avoiding public excommunicates not only in judicial but also in extrajudicial affairs.²

¹ Blat, *Commentarium*, V, *De Delictis et Poenis*, n. 90.

² " * * * et nedum in judicialibus, sed etiam in extrajudicialibus evitari, ac a legitimis actibus removeri debet." C. 14, *de sent. excom.* V, 11 in VI.

The Code gives a taxative enumeration of what are now to be understood as legitimate ecclesiastical acts. By the term *legitimate ecclesiastical acts* are understood: the office of administrator of ecclesiastical goods; the functions of those persons in ecclesiastical causes who act as judge, auditor and relator, *defensor vinculi*, promoter of justice and of faith, notary and chancellor, *cursor* and *apparitor*, advocate and procurator; the office of sponsor in the Sacraments of Baptism and Confirmation; voting in ecclesiastical elections; exercising the *juspatronatus*.³

PRE-CODE DISCIPLINE

Administrator of Ecclesiastical Goods. There seems to have been no explicit and direct legislation removing excommunicates from the office of administrator of ecclesiastical goods. However, authors deduced such an exclusion from the very nature and notion of excommunication.⁴

Judicial Procedure. Under the law of the Decretals, excommunicates were deprived of all forensic communication. They could not act the part of judge, arbiter, advocate, procurator, witness, notary, secretary, etc.⁵ At first this exclusion extended to all excommunicates whose censure was publicly known. After the Constitution "*Ad vitanda*," it was applied in its full rigor only to the *vitandi*, who could not *validly* exercise any act pertaining to ecclesiastical courts. They were to be excluded absolutely and *ex officio*, whether the faithful or the interested parties demanded it or not. The *tolerati* could not *licitly* exercise any act pertaining to ecclesiastical

³ Can. 2256, n. 2.

⁴ " * * * de qua re nihil invenio expresse et in particulari in jure definitum. Est nihilominus illa sententia vera ex generali ratione, et privatione communicationis, quam affert excommunicatio major." Suarez, *De Censuris*, disp. XIII, s. 2, n. 6. Cf. Crnica, *Modificaciones in Tractatu de Censuris*, p. 101.

⁵ C. 24, 26, C. II, q. 7; c. 4, C. XXIV, q. 1; c. 39, X, *de sent. excom.* V, 39; c. 24, X, *de sent. et re jud.* II, 27; c. 1, *de sent. et re jud.* II, 14 in VI°; c. 13, § 5, X, *de haeret.* V, 7; c. 8, *de sent. excom.* V. 11 in VI°; c. 7, X, *de jud.* II, 1; c. 7, X, *de prob.* II, 19; c. 7, X, *de except.* II, 25; c. 1, X, *de haeret.* V, 7.

courts, unless they were requested to do so. Their exercise of judicial acts, however, was always valid, unless the exception of excommunication was opposed to them by the judge *ex officio*, or by one of the interested parties. Since the faithful had the option of associating with the *tolerati* or not, they could object to their being admitted to judicial procedure in any capacity. Since it often happened that the exception of excommunication was made maliciously and solely for the purpose of delaying the case, it was enacted that the excommunication of the person to whom exception was taken had to be proven within eight days.⁶ When the censure was proven, the person had to be removed from the procedure.

This effect of excommunication at one time extended to the exercise of judicial acts even in secular courts, and to at least the licit acquisition of public civil offices.⁷ This may seem rather strange at the present time, but it must be remembered that at one time the State recognized the effects of excommunication and aided the Church to enforce them. Long before the promulgation of the Code, this portion of the law fell into desuetude.

Sponsorship at Baptism and Confirmation. Because of the grave duties which the sponsors at Baptism and Confirmation assume, the Church has always been solicitous that no one be admitted in this capacity whose mode of living did not guarantee the fulfillment of the sponsorial duties. Consequently, public sinners and those who were publicly known to be under ban of excommunication have always been excluded from acting in this capacity. The Roman Ritual stated explicitly that public excommunicates were not to be admitted as Baptismal sponsors.⁸ Explicit reference is made to the exclusion of excommunicates from sponsorship at Confirmation in the Roman Pontifical,⁹ and in an instruction

⁶ C. 1, *de except.* II, 12 in VI°.

⁷ Schmalzgrueber, para. IV, tit. XXXIX, n. 170; Suarez, *De Censuris*, disp. VII, s. 1, n. 1; Wernz, VI, n. 195; cf. c. 13, X, *de poenis*, V, 37.

⁸ Tit. II, cap. 1, nn. 22-26.

⁹ Tit. *De Commandis*.

of the Sacred Congregation for the Propagation of the Faith, issued on May 4, 1774.¹⁰

Voting in Canonical Elections. The *vitandi* could not validly take part in canonical elections. Votes cast by the *tolerati*, however, were valid, unless exception was taken to their participating in the election.¹¹

The Exercise of the Juspatronatus. The exercise of the *juspatronatus* was forbidden to all under ban of major excommunication. Hence, presentation by an excommunicate was always illicit; if the excommunicate was a *vitandus*, the presentation was invalid and could not be admitted by the superior; if the excommunicate was a *toleratus*, the superior could admit the presentation, but was not obliged to do so.¹²

THE PRESENT DISCIPLINE

Canon 2263 states that an excommunicate is removed from legitimate ecclesiastical acts within the limits specified in the various places in law. What is the meaning of the clause "intra fines suis in locis jure definitos"? A strict interpretation of this clause would lead to the conclusion that excommunicates are removed from legitimate ecclesiastical acts only in so far as their removal therefrom is stated in the canons which treat specifically of the various legitimate ecclesiastical acts. A few examples may help to clarify this statement. Sponsorship at baptism is a legitimate ecclesiastical act. According to Canon 765, n. 2, the *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been passed cannot validly act as sponsors, and according to Canon 766, n. 2, persons who are excommunicated for some notorious delict cannot licitly be admitted in this capacity. No mention is made in these canons of other excommunicates. Hence, according to the interpretation given above, all other excommunicates may freely and of

¹⁰ *Coll. S. C. P. F.*, n. 503.

¹¹ Wernz, II, n. 357, not. 29; cf. c. 23, X, *de appell.* II, 28; c. unic. *sed vac.* III, 8 in VI.

¹² Wernz, II, n. 440; cf. Suarez, *De Censuris*, disp. XIV, s. 2, n. 30^{aa}.

their own accord offer themselves to act as sponsors. In other words, all other excommunicates are *permitted* to act in the capacity of baptismal sponsor. In the section of the Code which treats of the administration of ecclesiastical goods,¹³ another legitimate ecclesiastical act, no mention is made of excommunicates acting as administrators.¹⁴ Hence, according to the interpretation given above, no excommunicate is forbidden to act in this capacity. These are some of the results of a strict interpretation of the clause "intra fines suis in locis jure definitos," and, according to general principles, a strict interpretation should be followed in this matter. Blat seems to follow the strict interpretation, for commenting upon the clause under discussion, he writes "ultra quos non extendatur remotio."¹⁵

The following interpretation is proposed as more in conformity with the nature of excommunication and with the other effects of the censure.

It would seem that no excommunicate may licitly exercise any legitimate ecclesiastical act. This seems to be the opinion of Pighi,¹⁶ Chelodi¹⁷ and Cappello.¹⁸ Chelodi, enumerating the essential effects of excommunication, writes: " * * * quilibet excommunicatus prohibetur * * * actus legitimos ponere * * * ." Cappello, treating of the effects of excommunication which are common to all under ban of this censure, writes: "Excommunicatus nequit actus legitimos ponere * * * Actus legitimi ecclesiastici, ab excommunicato [tolerato] positi, sunt * * * illiciti * * * ." That this opinion is correct seems evident from the other effects of excommunication. "Prohibetur [excommunicatus] ecclesiasticis officiis seu muneribus fungi."¹⁹ The Code itself speaks of the office of administrator of ecclesiastical goods and of

¹³ Can. 1518-1528.

¹⁴ Of. however, Canons 1520, § 1 and 1521, § 1, which speak of the qualities of those who are to be appointed as administrators.

¹⁵ *Commentarium*, V, *De Delictis et Poenis*, n. 90.

¹⁶ *Censuræ Sententiæ Latae*, n. 24.

¹⁷ *Jus Poenale*, n. 37.

¹⁸ *De Censuris*, n. 150.

¹⁹ Can. 2263.

sponsorship at Baptism and Confirmation as *munera*. Certainly most of the judicial offices listed among the legitimate ecclesiastical acts are, to say the very least, ecclesiastical *munera*. The offices of judge, auditor and relator require an exercise of the power of jurisdiction, and, according to Canon 2264, no excommunicate can licitly exercise that power. The exercise of the *juspatronatus* consists principally in the right of presentation, and, according to Canon 2265, § 1, n. 1, no excommunicate may licitly exercise this right.

The clause, “*intra fines suis in locis jure definitos*” seems to be a guide to determine whether the placing of a legitimate ecclesiastical act by an excommunicate is, besides being illicit, invalid as well. Furthermore, it is to be understood not only concerning the places in law which treat specifically of the legitimate ecclesiastical acts, but likewise with reference to the other canons dealing with the effects of excommunication.

Canon 2232, § 1 must be kept in mind when there is question of excommunicates’ exercising legitimate ecclesiastical acts. As has already been seen, this canon states that a *latae sententiae* penalty, whether medicinal or vindictive, *ipso facto* binds the delinquent who is conscious of the delict in both forums; before a declaratory sentence, however, the delinquent is excused from observing the penalty whenever he cannot observe it without loss of good repute, and no one can exact the observance of the penalty in the external forum, unless the delict is notorious.

Administrator of Ecclesiastical Goods.

No excommunicate can licitly exercise the office of administrator of ecclesiastical goods, either as an individual or as a member of a board of administration. No excommunicate can licitly acquire such an office.²⁰ The acquisition of such an office, however, is not invalid, unless the excommunicate is a *vitandus* or a *toleratus* against whom a declaratory or condemnatory sentence

²⁰ Can. 2265, § 1, n. 2.

has been passed.²¹ It would seem that acts of administration of ecclesiastical goods are invalid only when posited by a *vitandus*. This follows from Canon 2266 by which a *vitandus* is *ipso facto* deprived of any *munus* which he may hold, and consequently of the office of administrator of ecclesiastical property, and likewise of any benefice or office to which the administration of church goods may be annexed. There seems to be no law which invalidates acts of administration of church property which are posited by the *tolerati post sententiam* who held such an office before the sentence was pronounced against him. This seems rather strange in view of the fact that the Code has practically placed the *tolerati post sententiam* in the same category as the *vitandi*, and generally attaches invalidly not only to acts placed by the *vitandi* but also to those posited by the *tolerati post sententiam*.²²

Judicial Procedure.

According to the interpretation which has been given to Canon 2263, no excommunicate can licitly act as judge, auditor and relator, *defensor vinculi*, promoter of justice and of faith, notary and chancellor, *cursor* and *apparitor*, advocate and procurator in ecclesiastical causes. It is to be noted that an excommunicate is forbidden to act as judge, auditor and relator by virtue of Canon 2264, for these offices require an exercise of the power of jurisdiction.

It does not seem to be correct to cite Canon 1654, § 2 as permitting the *simpliciter tolerati* to hold office in ecclesiastical courts, unless they are repelled. This canon reads: "Alii excommunicati generatim stare in iudicio queunt." It seems to have reference to admitting the *simpliciter tolerati* as plaintiffs and not in any other capacity. This seems clear from § 1 of the same canon, which mentions in what cases the *vitandi* and the *tolerati post sententiam* may be admitted as plaintiffs. Further-

²¹ Can. 2265, § 2.

²² Cf. Can. 2264; 2265, § 2.

more, Canon 1654 comes under the title, "*De Partibus in causa*" and under the caption, "*De actore et reo convento*."

The *simpliciter tolerati* always exercise the office of judge, auditor and relator, *defensor vinculi*, etc., validly. Moreover, they exercise them licitly, when they are requested either explicitly or implicitly by the faithful to do so; which, as Roberti very well remarks, is always the case in these matters.²³ It is clear from Canon 2264 that a *simpliciter toleratus* can licitly act as judge, or in any other capacity requiring an exercise of the power of jurisdiction, when requested to do so. It seems that the same is to be said of any other office in ecclesiastical courts, for this principle seems to run through this entire legislation.

Just as formerly, the faithful may object to the admission of the *simpliciter tolerati* to judicial procedure in any capacity. The exception of excommunication can be opposed in any stage or instance of the trial, up to the definitive sentence.²⁴ Noval is of the opinion that the exception of excommunication cannot be opposed in the appeal or in other remedies against the sentence.²⁵ Roberti takes exception to this opinion. He affirms that the exception of excommunication can be opposed in the appeal or in other remedies against the sentence. The definitive sentence, of which the canon speaks, is to be understood not only of the sentence of the first instance, but of the sentence of any instance ("in quolibet gradu"). "Dicitur 'definitiva' ut opponatur interlocutoriis."²⁶

The *vitandi* and the *tolerati post sententiam* must always be excluded *ex officio* from any office in ecclesiastical courts.²⁷ They are to be excluded *ex officio*, that is, the judge is bound by reason of his office to exclude them, whether the interested parties demand it or not. It is to

²³ *De Processibus*, I, n. 175.

²⁴ Can. 1628, § 3.

²⁵ *De Processibus*, pars I, *De Judiciis*, n. 222.

²⁶ *De Processibus*, I, n. 175.

²⁷ Can. 1628, § 3.

be noted that the *vitandi* and the *tolerati post sententiam* cannot validly act in the capacity of judge, auditor or relator, for these offices require an exercise of the power of jurisdiction.²⁸ Do such excommunicates invalidly exercise the office of notary, *defensor vinculi*, etc? Certainly, the *vitandi* cannot validly exercise such offices, for they are *ipso facto* deprived of any position which they hold in the Church.²⁹ The *tolerati post sententiam* could not validly exercise such offices, if they were appointed to them after the sentence had been passed against them.³⁰ There seems to be no law which *expressly* invalidates the exercise of such offices by the *tolerati post sententiam* who held such offices before the sentence was pronounced against them. Perhaps Canon 1628, § 3 does so *equivalently* when it states that such excommunicates “*ex officio semper excludi debent.*” However, this discussion is of little practical import. It would not very often happen that a *vitandus* or a *toleratus post sententiam* would be admitted to an ecclesiastical trial in any official capacity.

It may be well to mention here in connection with judicial procedure, the legislation concerning excommunicates in the capacity of arbiters and witnesses, although neither acting as an arbiter, nor testifying in ecclesiastical courts is listed among the legitimate ecclesiastical acts by Canon 2256, n. 2. The *vitandi* and the *tolerati post sententiam* cannot validly act in the capacity of arbiter.³¹ The same classes of excommunicates are numbered among the *suspecti* who are repelled from testifying in ecclesiastical courts.³² Their testimony, however, can be heard, if the judge deems it expedient, but it will avail only as an indication and support of the proof. Generally, they are to be heard without being placed under oath.³³

²⁸ Can. 2264; cf. Roberti, *De Processibus*, I, n. 110; Noval, *De Processibus*, pars I, *De Judiciis*, n. 131.

²⁹ Can. 2266.

³⁰ Can. 2265, § 2.

³¹ Can. 1931.

³² Can. 1757, § 2, n. 1.

³³ Can. 1758.

Sponsorship at Baptism and Confirmation.

Since, practically speaking, the same qualifications are demanded of the sponsors at Confirmation as at Baptism, both shall be considered together. Hence, whenever mention is made of sponsors or sponsorship, reference is had both to the Sacrament of Baptism and to the Sacrament of Confirmation.

Canon 765 and 795 enumerate certain qualifications which are demanded for a valid sponsorship. This is evident from the very wording of the canons: "Ut quis sit patrinus." "The use of the word *esse* in this connection imports either existence or non-existence; hence, unless one be endowed with these essential qualifications for acting as sponsor, his actions would be considered null and void."⁸⁴ Furthermore, the conditions mentioned in Canons 766 and 796 are required in order that one can licitly be admitted as sponsor, which seems to imply that the qualifications demanded by the preceding canons are for validity.⁸⁵

In order that one may validly act in the capacity of sponsor, it is required that he be not excommunicated by a condemnatory or declaratory sentence,⁸⁶ or, in other words, a *vitandus* or a *toleratus* against whom a condemnatory or declaratory sentence has been passed cannot validly act as sponsor. The qualifications which are demanded by Canons 765 and 795 must all be present in one and the same case to constitute a valid sponsorship. Hence, if a *vitandus* or a *toleratus post sententiam*, through forgetfulness, carelessness or disregard for the law of the Church was permitted to go through the formalities of a sponsor, his sponsorship would be invalid, even though he was endowed with all the other qualifications demanded by the canons; consequently, he would contract no spiritual relationship with the person baptized, nor would he be obliged to look after the spiritual welfare of the same.

⁸⁴ Kearney, *Sponsors at Baptism*, p. 76.

⁸⁵ *Ibidem*.

⁸⁶ Can. 765, n. 2; 795, n. 2.

Canons 766 and 796 enumerate certain qualifications which are required in order that one may licitly be admitted as a sponsor. In order that one may licitly be admitted as sponsor, it is required, among other things, that he be not excommunicated for some notorious delict, or, in other words, a person who is excommunicated for some notorious delict cannot licitly be admitted as a sponsor.⁸⁷

Canons 766 and 796 imply that occult excommunicates can licitly be *admitted* as sponsors. From this, however, one cannot conclude that such excommunicates can freely and of their own accord present themselves to act in the capacity of sponsor, or that such excommunicates are *simpliciter* permitted to act as sponsors. It is to be noted that Canons 766 and 796 do not treat precisely of those who can *licitly act* as sponsors, but of those who can *licitly be admitted* as sponsors: "Ut autem quis licite patrinus admittatur"; "Ut quis licite ad patrini munus admittatur." That the term *admittere* is to be understood in this sense seems clear from other portions of these canons in which reference is made to the judgment of the minister: "nisi aliud justa de causa ministro videatur"; "nisi rationabilis causa, iudicio ministri, aliud suadeat"; "nisi aliud ministro in casibus particularibus ex rationabili causa videatur." Furthermore, Canon 766, n. 2 implies that one who is excluded from legitimate acts for a delict that is not notorious can licitly *be admitted* as sponsor. Certainly one who is excluded from legitimate acts, even for a delict that is not notorious, *per se* cannot licitly *act* as sponsor. The Code implies that persons who are excommunicated for a delict that is not notorious can licitly *be admitted* as sponsors. This is in conformity with Canon 2232 which states that before a declaratory sentence, no one can exact the observance of a *latae sententiae* penalty in the external forum, unless the delict is notorious. Hence, far from being at a variance with the interpretation that has been

⁸⁷ Can. 766, n. 2; 796, n. 3.

given to Canon 2263, namely, that no excommunicate can licitly place any legitimate ecclesiastical act, Canons 766 and 796 seem to confirm it.

Voting in Ecclesiastical Elections.

No excommunicate can vote at least in those ecclesiastical elections which are conducted according to the regulations laid down in the Code under the caption "*De Electione*."³⁸ Although these canons have reference primarily to election of a person to an ecclesiastical office in the strict sense of the term, yet the same regulations are followed whenever the votes of subjects designate a superior to rule a community, although without the power of jurisdiction in the strict sense of the term.³⁹ A vote cast by a *vitandus* or a *toleratus* against whom a declaratory or condemnatory sentence has been passed is invalid. The election itself, however, is not invalid, except in two cases: (1) when it is certain that the vote of the excommunicate was decisive, that is, when it is certain that without the vote of the excommunicate, the person elected would not have received a sufficient number of votes to gain the election; (2) when the excommunicate was knowingly (*scienter*) admitted to participate in the election.⁴⁰

What has been said does not apply to the election of the Sovereign Pontiff which is governed by the Constitution "*Vacante Sede Apostolica*," issued by Pope Pius X on December 25, 1904. It may be interesting to quote a portion of this Constitution which has some bearing upon the subject under discussion. "*Nullus Cardinalium, cujuslibet excommunicationis, suspensionis, interdicti aut alius ecclesiastici impedimenti praetextu vel causa a Summi Pontificis electione activa et passiva excludi ullo modo potest; quas quidem censuras et excommunica-*

³⁸ Can. 160-178.

³⁹ Vermeersch-Creusen, *Epitome*, I, n. 240; Can. 145, § 2; 507, § 1; cf. Maroto, *Institutiones Juris Canonici*, I, n. 611; Cocchi, *Commentarium*, II, n. 74.

⁴⁰ Can. 167, § 2.

tiones ad effectum hujusmodi electionis tantum, illis alias in suo robore permansuris, suspendimus." 41

The Right of Patronage.

The right of patronage is defined as the "summa privilegiorum, cum quibusdam oneribus, quae ex Ecclesiae concessionem competunt fundatoribus catholicis ecclesiae, cappellae aut beneficii, vel etiam eis qui ab illis causam habent." 42

The right of patronage may be either *real* or *personal*. It is *real* when it is attached to a thing; it is *personal*, when it inheres in a person. 43

Patrons have the privilege: 1) of presenting a cleric to a vacant church or benefice; 2) under certain circumstances and conditions of obtaining support from the revenue of the church or benefice; 3) of enjoying, where such is customary, certain prerogatives of honor, ex gr., of having their coat-of-arms placed in the church of their patronage, of preceding other laics in processions and similar functions, of having a more prominent seat in the church. 44

A personal right of patronage cannot validly be transferred to the *vitandi* or the *tolerati* against whom a declaratory or condemnatory sentence has been pronounced. 45 If a thing to which a real right of patronage is attached passes into the possession of a *vitandus* or a *toleratus post sententiam*, the right of patronage remains suspended. 46 No excommunicated patron can licitly exercise the right of presentation, 47 nor enjoy the privileges which are attached to the right of patronage. 48 Presentation made by an excommunicated patron is not invalid, unless the patron is a *vitandus* or a *toleratus*

41 Tit. II, cap. I, n. 29, (*Codex Juris Canonici, Docum. I*). Cf. Motu Proprio Pii XI, "*Cum Proxime*," (*AAS*, XIV, pp. 145-146).

42 Can. 1448.

43 Can. 1449, n. 1.

44 Can. 1455.

45 Can. 1453, § 1.

46 Can. 1453, § 3.

47 Can. 2265, § 1, n. 1.

48 Can. 2263.

against whom a declaratory or condemnatory sentence has been issued.⁴⁹ It would seem, too, that such excommunicates cannot validly make use of the privileges which accompany the right of patronage.⁵⁰

II. EXCOMMUNICATES AS PLAINTIFFS IN ECCLESIASTICAL COURTS

Nequit in causis ecclesiasticis agere, nisi ad normam can. 1654.

CANON 1654.

§ 1. *Excommunicatis vitandis aut toleratis post sententiam declaratoriam vel condemnatoriam permittitur ut per se ipsi agant tantummodo ad impugnandam justitiam aut legitimitatem ipsius excommunicationis; per procuratorem, ad aliud quodvis animae suae praejudicium avertendum; in reliquis ab agendo repelluntur.*

§ 2. *Alii excommunicati generatim stare in iudicio queunt.*

PRE-CODE LAW

The general rule was that excommunicates could not be plaintiffs (*actores*) in ecclesiastical courts.⁵¹ This prohibition, however, was applied in its full rigor only to the *vitandi*. With but few exceptions, they could not be plaintiffs, either personally or by proxy. Even though the exception of excommunication was not opposed to them by the interested parties, the judge was bound by reason of his office to repel them. The *vitandi*

⁴⁹ Can. 2265, § 2; 1470, § 4.

⁵⁰ Can. 1470, § 4.

⁵¹ C. 1, C. IV, q. 1; c. 4, C. VI, q. 1; c. 15, X, *de procuratoribus*, I, 38; c. 7, X, *de iudiciis*, II, 1; c. 2, 5, 8, 11, 12, X, *de exceptionibus*, II, 25; c. 20, X, *de accusationibus, inquisitionibus et denuntiationibus*, V, 1; c. 1, *de exceptionibus* II, 12 in VI^o; c. unic. *de exceptionibus*, II, 10 in Clem.

were admitted as plaintiffs in order to prove the invalidity of the sentence of excommunication. If, however, they desired to prove that it was unjust, they had to be absolved beforehand, since in this case, they seemed to admit that they were under ban of excommunication.⁵²

They were likewise admitted as plaintiffs in certain grave cases, especially when there was question of danger to soul, ex. gr., in matrimonial cases.⁵³

Both the judge, by reason of his office, and the interested parties could oppose the exception of excommunication against a plaintiff who was a *toleratus*, but neither was obliged to do so.

This effect of excommunication once extended to secular courts. Thus Pope Alexander IV ordered secular judges to repel excommunicates from acting in their courts.⁵⁴ Long before the promulgation of the Code, however, this effect of excommunication, in so far as it extended to secular courts, had fallen into desuetude.

Excommunicates were obliged, when cited, to appear before an ecclesiastical court as defendant or accused. Otherwise they would be able to evade justice, avoid punishment and thus be aided rather than impeded by the censure.⁵⁵ The law expressly granted them full right of defending themselves.⁵⁶ At one time they were obliged to employ a procurator to defend them.⁵⁷ This obligation, however, was very seldom enforced, lest it seem as a denial of the right of self-defence, and gradually it fell into oblivion.⁵⁸

THE PRESENT LAW

The general principle is that anyone can be a plaintiff before an ecclesiastical court, unless he is prohibited

⁵² C. 40, X, *de sententia excommunicationis*, V, 39.

⁵³ Cf. Wernz, V, n. 168, not. 64.

⁵⁴ C. 8, *de sententia excommunicationis*, V, 11 in VI°.

⁵⁵ Smith, *Elements of Ecclesiastical Law*, III, n. 3227.

⁵⁶ C. 5, X, *de exceptionibus*, II, 25.

⁵⁷ C. 7, X, *de iudiciis*, II, 1.

⁵⁸ Boberti, *De Processibus*, I, n. 205.

from doing so by the sacred canons.⁵⁹ Canon 2263 states that an excommunicate cannot be a plaintiff in ecclesiastical courts, except in so far as Canon 1654 permits. Before proceeding to discuss Canon 1654, it is well to point out that at the present time, this effect of excommunication extends only to ecclesiastical courts. The Code has not reënacted the law which once extended this prohibition even to secular courts. Of course, the faithful must avoid communication *in profanis* with the *vitandi*, unless there is question of husband or wife, parents, children, servants, subjects, or in general unless a reasonable cause excuses.⁶⁰

Canon 1654, § 1 states that *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been issued can personally (*per se*) appear in court as plaintiffs, only when they desire to impugn the justice or the legitimacy (validity) of their excommunication. It is to be noted that the Code is more lenient in this regard than the former discipline, which, as has been seen, demanded the *vitandi* to be absolved before instituting an action against the justice of their excommunication. Canon 1654, § 1, further states that the *vitandi* and the *tolerati post sententiam* can be plaintiffs, but only by proxy, in order to avert any other spiritual danger. Authors generally cite matrimonial cases as examples of cases in which there is question of averting a spiritual danger.⁶¹ However, matrimonial cases are not the only ones in which there might be question of warding off danger of soul. The words employed by the canon are very general: "Ad aliud quodvis animae suae praejudicium avertendum." Hence, whenever, in the prudent estimation of the judge, there is truly a question of preventing a spiritual danger, the *vitandi* and the *tolerati post sententiam* are to be admitted as plaintiffs, but only by proxy.

⁵⁹ Can. 1646.

⁶⁰ Can. 2267.

⁶¹ Vermeersch-Creusen, *Epitome*, III, n. 79; Blat, *Commentarium*, IV, *De Processibus*, n. 130; Roberti, *De Processibus*, I, n. 205.

With the exception of the cases mentioned above, the *vitandi* and the *tolerati post sententiam* are to be repelled from acting in ecclesiastical courts. This prohibition is most useful to break down their contumacy, and consequently to procure what is most advantageous for them, that is, repentance and absolution from the censure. Nor can this prohibition be regarded as unjust, or even as too severe, for the inability of such persons to appear in court as plaintiff is due solely to their own malice, for they can, whenever they so desire, be freed from the censure.⁶²

The *vitandi* and the *tolerati post sententiam*, except in cases in which they desire to impugn the justice or the legitimacy of the excommunication, or to avert some other spiritual danger, are to be repelled from acting in ecclesiastical courts. They are to be repelled, because they cannot *validly* be admitted as plaintiffs; they are not entitled to *act* in an ecclesiastical court (*non habent personam standi in iudicio*). Consequently, a sentence given in a case, in which such a person was admitted as plaintiff is incurably null ("vitio insanabilis nullitatis laborat").⁶³

All other excommunicates, that is, except the *vitandi* and the *tolerati post sententiam*, can generally stand in ecclesiastical courts.⁶⁴ This provision of law, however, is modified by Canon 1628, § 3, which gives the opposing parties the right to oppose the exception, or the objection of excommunication. The sense of Canon 1654, § 2, is, therefore, that all other excommunicates can stand in ecclesiastical courts, unless the exception of excommunication is brought and proven against them.⁶⁵

All accused excommunicates, when legitimately cited, must answer,⁶⁶ either personally or by proxy. Even

⁶² Noval, *De Processibus*, pars 1, *De Judiciis*, n. 262.

⁶³ Can. 1892, n. 2.

⁶⁴ Can. 1654, § 2.

⁶⁵ Woywod, *A Practical Commentary on the Code of Canon Law*, II, n. 1628; Noval, *De Processibus*, pars 1, *De Judiciis*, n. 263; Roberti, *De Processibus*, I, n. 205; Vermeersch-Creusen, *Epitome*, III, n. 79.

⁶⁶ Can. 1646.

though they have chosen a procurator or an advocate, they are bound to be present in person, when the law or the judge demands their personal presence.⁶⁷

The question now arises whether an excommunicate can bring a counter-claim against the plaintiff. A counter-claim (*reconventio*) is an action (*actio*) which the defendant institutes before the same judge and in the same trial for the purpose of disposing of, or lessening, the claim of the plaintiff.⁶⁸ Roberti⁶⁹ and Noval,⁷⁰ looking upon counter-claims as actions, are of the opinion that excommunicates cannot bring counter-claims against a plaintiff. This statement, of course, must be understood in the light of what has already been said concerning excommunicates as plaintiffs, and hence it is to be applied in its full rigor only to the *vitandi* and the *tolerati post sententiam*. There is much to be said for the opinion of Roberti and Noval, especially since Canon 1690 defines a counter-claim as an action. Since, however, counter-claims have somewhat the nature of legitimate defence, it cannot be held for certain that excommunicates are excluded from making use of them, for there is no positive and express legislation to this effect.

III. DISCHARGE OF ECCLESIASTICAL OFFICES

Prohibetur (excommunicatus) ecclesiasticis officiis seu muneribus fungi.

The term *ecclesiastical office* may be understood either in a wide or in a strict sense. In the wide sense of the term, it is any duty that is legitimately exercised for a spiritual end.⁷¹ In the strict acceptation of the term, an ecclesiastical office is a position stably instituted by divine or ecclesiastical authority which is conferred according to Canon Law, and which carries with it some

⁶⁷ Can. 1647.

⁶⁸ Can. 1690.

⁶⁹ *De Processibus*, I, n. 205.

⁷⁰ *De Processibus*, pars I, *De Judiciis*, n. 265.

⁷¹ Can. 145, § 1.

participation in the ecclesiastical power of orders or jurisdiction.⁷² Canon 145, § 2 states that in law, the term *ecclesiastical office* is to be understood in its strict sense, unless the contrary is apparent from the context.

Canon 2263 is quite in conformity with the law of the Decretals in forbidding excommunicates to discharge ecclesiastical offices and duties. It seems clear from what has already been said that under the law of the Decretals, no excommunicate could licitly discharge any ecclesiastical office or duty.

Canon 2263 states that excommunicates are forbidden to discharge ecclesiastical offices and duties. The canon evidently has reference to ecclesiastical offices, understood both in the strict and in the wide sense of the term. An excommunicate is forbidden to exercise an ecclesiastical office understood in the strict sense of the term, that is, an office implying some participation in the power of orders or of jurisdiction. This prohibition is very closely connected with Canon 2261 which forbids the exercise of the power of orders to excommunicates and with Canon 2264 which forbids them to posit acts of jurisdiction.

Canon 145, § 2 declares that in law the term *ecclesiastical office* is to be understood in its strict sense, unless the contrary is apparent from the context. The canon under discussion, however, clearly indicates that the term is to be understood not only in its strict sense, but also in its wide acceptance. This is evident from the very wording of the canon "*officiis seu muneribus.*" Hence, excommunicates are forbidden to exercise not only an office which implies a participation in the power of orders or of jurisdiction, but likewise any office or duty whatsoever that is assumed for a spiritual purpose.

⁷² Can. 145, § 1.

IV. USE OF PRIVILEGES

(*Prohibetur excommunicatus concessisque antea ab Ecclesia privilegiis frui.*

A privilege is a special and permanent faculty granted by a superior either against or beyond the common law.⁷³ Authors mention many divisions of privileges. For our purpose, it will be necessary to note only one division—the division of privileges into personal and real privileges. A personal privilege is one that is granted directly and immediately to a person. A real privilege is one that is directly attached to a thing, place, office or dignity.

An excommunicate is forbidden to enjoy the privileges which were granted him by the Church before he fell under the censure. There is question here of privileges that were obtained before excommunication was incurred, because, generally speaking, privileges are not granted to those who are under ban of excommunication.⁷⁴ Privileges are not lost by the censure of excommunication, because, unless otherwise stated, they are considered to be perpetual.⁷⁵

There is question here of all personal privileges, but only personal privileges. Real privileges do not come under this prohibition. Whether an excommunicate can enjoy real privileges depends upon the nature of the privileges and their relations to the other effects of excommunication.⁷⁶

Since habitual faculties which are granted either *in perpetuum*, or for a definite time, or for a certain number of cases, are to be counted as privileges *praeter jus*,⁷⁷ it would seem that the disposition of law under discussion is to be applied to such faculties.⁷⁸ However,

⁷³ Cf. Noldin, *Summa Theologiae Moralis*, I, n. 192; Augustine, *Commentary*, I, p. 152.

⁷⁴ Cappello, *De Censuris*, n. 152; cf. Can. 2265, § 2.

⁷⁵ Can. 70.

⁷⁶ Cappello, *De Censuris*, n. 152.

⁷⁷ Can. 66, § 1.

⁷⁸ Cappello, *De Censuris*, n. 152.

as Cappello very well remarks, when there is question of such faculties, and, in general, of privileges which are not granted merely for the convenience of the individual, an excommunicate will more easily be excused from the observance of this prohibition. Furthermore, the same author is of the opinion that when such faculties and privileges concern the sacraments and sacramentals, excommunicates can employ them licitly, whenever they can licitly administer the sacraments and sacramentals in accordance with Canon 2261.⁷⁹ Cipollini concedes probability to this opinion, but seems to favor the negative view-point.⁸⁰ It would seem, however, that the opinion of Cappello is to be preferred for there is question here of privileges that are granted, not in favor of the one who possesses them, but in favor of the faithful in general; furthermore, such privileges are *enjoyed*, not by the one who makes use of them, but by the one to whose advantage they are employed.⁸¹

⁷⁹ *Ibidem*.

⁸⁰ "Videretur negandum, quia Ecclesia excommunicatum simpliciter usu privilegiorum privat; concedendo vero ut fideles ex qualibet justa causa ab eo Sacramenta petant vel Sacramentalia, non ideo privilegiorum concedit usum, sed ordinarium tantum permittit ministerium." *De Censuris Latae Sententiae*, n. 65.

⁸¹ Cipollini, *loc. cit.*

CHAPTER VI.

THE EXERCISE OF JURISDICTION

CANON 2264.

Actus jurisdictionis tam fori externi quam fori interni positus ab excommunicato est illicitus; et, si lata fuerit sententia condemnatoria vel declaratoria, etiam invalidus, salvo prae-scripto can. 2261, § 3; secus est validus, imo etiam licitus, si a fidelibus petitus sit ad normam mem. can. 2261, § 2.

It has already been seen that in ordinary circumstances excommunicates cannot exercise the power of orders.¹ According to Canon 2264, they cannot in ordinary circumstances place acts of jurisdiction either of the external or of the internal forum.

Ecclesiastical jurisdiction may be defined as “potestas publica regendi homines baptizatos in ordine ad salutem aeternam a Deo vel ab Ecclesia concessa.”²

The power of jurisdiction is divided by reason of the forum in which it is exercised into jurisdiction of the external forum and jurisdiction of the internal forum. Jurisdiction of the external forum has reference primarily and immediately to the common good and regulates the actions of the faithful to the Church as a visible society. Jurisdiction of the external forum is divided, by reason of the manner in which it is exercised, into judicial and voluntary jurisdiction, according as it is exercised with or without formal judicial procedure.

¹ *Supra*, p. 88ff.

² Cf. Noldin, *Summa Theologiae Moralis*, I, n. 128; Vermeersch-Creusen, *Epitome*, I, n. 200; Wernz-Vidal, *Jus Canonium*, II, n. 48; Maroto, *Institutiones Juris Canonici*, I, n. 573; Kelly, *The Jurisdiction of the Simple Confessor*, p. 12.

Jurisdiction of the internal forum has reference primarily and immediately to the spiritual welfare of the individual and regulates the obligations of conscience *in ordine ad Deum*. Jurisdiction of the internal forum is two-fold, according as it is exercised in the act of sacramental confession (internal sacramental forum), or outside the Sacrament of Penance (internal non-sacramental forum).

Jurisdiction is divided *ratione tituli* into ordinary and delegated jurisdiction. Ordinary jurisdiction is that which is *ipso jure* annexed to an office, so that when one acquires that office, *ipso facto* he acquires the jurisdiction connected with it. Ordinary jurisdiction is either *proper* or *vicarious*. It is proper when the office is a principle one, ex. gr., a bishopric, and is exercised in one's own name; it is *vicarious* when the office is an accessory one, ex. gr., the office of a vicar-general, and is exercised in another's name.³ Delegated jurisdiction is not *ipso facto* attached to an office, but is obtained by the commission of a competent superior.⁴

PRE-CODE LAW

All excommunicates were deprived of ecclesiastical jurisdiction in such a manner that they could not exercise acts thereof, at least licitly.⁵ The reason was because the exercise of jurisdiction is *praecipua cum fidelibus communicatio*. This privation affected even the *tolerati*, who sinned mortally by exercising the power of jurisdiction, unless they were requested by the faithful to do so.⁶

Were excommunicates altogether stripped of the power of jurisdiction, or were they merely forbidden the licit use of it? All authors agreed that the *vitandi* were

³ Can. 197, § 1, § 2. Cf. Kelly, *The Jurisdiction of the Simple Confessor*, p. 14.

⁴ Can. 197, § 1.

⁵ C. 4, 35, 36, 37, C. XXIV, q. 1; c. 24, X, *de sententia et re judicata*, II, 27; c. 13, X, *de haereticis*, V, 7; c. 1, *de officio vicarii* I, 13 in VI°; c. 10, *de officio et potestate judicis delegati*, I, 14 in VI°.

⁶ Schmalzgrueber, pars IV, tit. XXXIX, n. 163.

altogether stripped of ecclesiastical jurisdiction.⁷ Consequently, acts of jurisdiction placed by them were invalid. Jurisdiction for the internal forum was restored to them for the extreme necessity of the moment of death.

The *tolerati* were not altogether stripped of the power of jurisdiction, but they were forbidden to exercise acts thereof. Even if they were publicly known to be under ban of excommunication, they could validly exercise jurisdiction, as long as they were not objected to by the faithful. The faithful could prevent their jurisdictional acts from having effect by objecting to them on the score of excommunication and by proving the existence of the censure. The faithful, however, were not obliged to take exception to the *tolerati*.⁸ Acts of jurisdiction posited by the *tolerati* at the request of the faithful were not only valid, but licit as well.

THE PRESENT LAW

Canon 2264 states that an act of jurisdiction of the external as well as the internal forum posited by an excommunicate is illicit; and, if a condemnatory or declaratory sentence has been issued against the excommunicate, it is invalid, saving the exception of Canon 2261, § 3; otherwise, it is valid, and even licit, if requested by the faithful in accordance with Canon 2261, § 2.

All excommunicates are forbidden to place acts of ordinary or delegated jurisdiction either of the external or of the internal forum. Hence, they are forbidden to establish laws, to pass judicial sentences, to grant dispensations, to absolve from sins and censures, etc. In this matter, however, there must be kept in mind the distinction between the *simpliciter tolerati* and the *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been passed.

⁷ Schmalzgrueber, pars IV, tit. XXXIX, n. 164; Suarez, *De Censuris*, disp. XIV, s. 1ss.; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 409; Wernz, VI, n. 194.

⁸ Schmalzgrueber, pars. IV, tit. XXXIX, n. 165; Suarez, *De Censuris*, disp. XIV, s. 1, n. 15; Wernz, VI, n. 193.

Acts of jurisdiction of either the external or the internal forum placed by the *simpliciter tolerati* are always valid. The Church, in not absolutely depriving the *simpliciter tolerati* of jurisdiction, but merely forbidding them the licit exercise thereof, has in mind the good of the faithful and the tranquillity of their conscience. It is evident that if such excommunicates were incapable of exercising jurisdiction validly, the faithful would be in constant doubt concerning the validity of the jurisdictional acts of their superiors.⁹

Acts of jurisdiction posited by the *simpliciter tolerati* are not only valid, but even licit, if they are requested by the faithful in accordance with Canon 2261, § 2. This canon, as we have already seen, permits the faithful for any just reason to request the *simpliciter tolerati* to administer the sacraments and sacramentals, especially if no other ministers are available. Hence, it must be said that for any just reason the faithful may request the *simpliciter tolerati* to place acts requiring an exercise of the power of jurisdiction, especially if no other competent persons are present. The principal reason which permits the faithful to do so is the absence of others who can exercise jurisdiction licitly. However, it is by no means the only reason; any just cause will suffice; it does not have to be grave.¹⁰

Almost all authors teach that a reasonably presumed or implicit petition suffices to allow a *simpliciter toleratus* to administer the sacraments and sacramentals licitly (*ratione censuræ*).¹¹ This, of course, includes the imparting of sacramental absolution, which is a jurisdictional act of the internal forum. There seems to be no reason why such an opinion cannot be extended to include acts of jurisdiction of the external forum. Hence, not only when the petition on the part of the faithful is explicit, but likewise when it is implicit or may reasonably be presumed, the *simpliciter tolerati* may place acts

⁹ Smith, *Elements of Ecclesiastical Law*, III, n. 3235.

¹⁰ *Supra*, pp. 91-92.

¹¹ *Supra*, pp. 92-93.

requiring an exercise of the power of jurisdiction of the external as well as of the internal forum.

The delegation of jurisdiction is itself an act of jurisdiction. The excommunicates now under consideration can, of course, validly delegate jurisdiction to others. Such delegation would be illicit, however, unless it was requested either explicitly or implicitly, which would almost always be the case. Whether or not one who is illicitly delegated can licitly exercise the delegation is a debated question. However, there is a probable opinion which maintains that such a one can licitly exercise the delegation.¹²

The *tolerati* against whom either a declaratory or condemnatory sentence has been issued, and, a fortiori, the *vitandi* cannot place acts of jurisdiction either validly or licitly. Prescinding from Canon 2264, it is to be noted that one who possesses ordinary jurisdiction is *ipso facto* deprived of it by the very fact that he becomes a *vitandus*; for a *vitandus* is *ipso facto* deprived of any office to which the power of jurisdiction might be annexed.¹³ Hence, the *vitandi* and the *tolerati post sententiam* cannot validly establish laws, pass judicial sentences, inflict censures, absolve from sins or censures, grant dispensations, etc. There is, however, an exception to this law. Even the *vitandi* and the *tolerati post sententiam* can validly and licitly absolve all penitents who are in danger of death from all sins and censures, no matter how they are reserved or how notorious they may be, even if an approved priest is present.¹⁴ For an explanation of this faculty as well as for a discussion of the power of excommunicates over matrimonial impediments, the reader is referred to the commentary on Canon 2261.¹⁵

¹² Cappello, *De Censuris*, n. 155.

¹³ Can. 2266; 208.

¹⁴ Can. 2264; 2261, § 1; 882.

¹⁵ *Supra*, p. 93ff.; p. 106ff.

Cappello is of the opinion that a very grave cause, outside the danger of death, such as fear of death, avoidance of a grave scandal, etc., would permit the *tolerati post sententiam* to place acts of jurisdiction validly and (*ratione censurae*) licitly.¹⁶

¹⁶ "Quoties tamen actus jurisdictionis licite ponitur, urgente mortis periculo vel, ut opinamur, gravissima alia causa, toties validum est." *De Censuris*, n. 157, 10°.

"Periculo mortis, ut indubitanter tenemus, aequiparanda est causa gravissima, v. g., metus mortis, scandalum grave vitandum, etc." *Ibidem*, 3°.

CHAPTER VII

THE RIGHT OF ELECTION, PRESENTATION, NOMINATION : ACQUISITION AND PRIVATION OF DIGNITIES, OFFICES, ETC. : RECEPTION OF ORDERS: PONTIFICAL RESCRIPTS

CANON 2265 AND 2266

CANON 2265:

§ 1. *Quilibet excommunicatus:*

1.º *Prohibetur jure eligendi, praesentandi, nominandi;*

2.º *Nequit consequi dignitates, officia, beneficia, pensiones ecclesiasticas, aliudve munus in Ecclesia;*

3.º *Promoveri nequit ad ordines.*

§ 2. *Actus tamen positus contra praescriptum*

§ 1, nn. 1, 2, *non est nullus, nisi positus fuerit ab excommunicato vitando vel ab alio excommunicato post sententiam declaratoriam vel condemnatoriam; quod si haec sententia lata fuerit, excommunicatus nequit praeterea gratiam ullam pontificiam valide consequi, nisi in pontificio rescripto mentio de excommunicatione fiat.*

CANON 2266:

Post sententiam condemnatoriam vel declaratoriam excommunicatus manet privatus fructibus dignitatis, officii, beneficii, pensionis, muneris, si quod habeat in Ecclesia; et vitandus ipsamet dignitate, officio, beneficio, pensione, munere.

I. THE RIGHT OF ELECTION, PRESENTATION, NOMINATION

CANON 2265, §1, n. 1.

Quilibet excommunicatus prohibetur jure eligendi, praesentandi, nominandi.

An ecclesiastical office in the wide sense of the term is any duty that is legitimately exercised for a spiritual purpose. In the strict sense of the term, an ecclesiastical office is a position stably instituted by divine or ecclesiastical authority which is conferred according to the rules of Canon Law and which carries with it some participation in the ecclesiastical power of orders or of jurisdiction. In Law, the term *ecclesiastical office* is to be understood in its strict signification, unless the contrary is apparent from the context.¹

An ecclesiastical office cannot be validly obtained without canonical appointment. By canonical appointment is understood the granting of an ecclesiastical office by competent ecclesiastical authority according to the regulations of Canon Law.²

Appointment to an ecclesiastical office is made: (1) by free appointment (*libera collatio*); (2) by institution, when presentation by a patron or nomination has preceded (*collatio necessaria*); (3) by confirmation or admission, if election or postulation has preceded; (4) by simple election and acceptance by the one elected, if the election does not require confirmation.³ Hence it is evident that some can enjoy the right of electing, presenting, or nominating a person for an ecclesiastical office.

Election in the strict canonical sense of the term, as distinct from other modes of appointment to ecclesiastical office, is defined as: "personae idoneae ad ecclesiasticum officium vacans per eos quibus jus suffragii competit, canonice facta vocatio."⁴

¹ Can. 145, §§ 1, 2.

² Can. 147, §§ 1, 2.

³ Can. 148, § 1.

⁴ Wernz, II, n. 352.

Presentation may be defined as: “*jus designandi et offerendi clericum idoneum ab Episcopo vel competente Praelato in officio ecclesiastico vacante necessario instituendum.*”⁵ The right of presentation usually has place in the *juspatronatus*. Thus Canon 1455 numbers among the privileges of patrons that of presenting a cleric for a vacant church or benefice. It has been said that the right of presentation *usually* has place in the *juspatronatus*. It is to be noted that sometimes the Holy See grants either by concordat or in some other manner an indult of presenting to a vacant church or parish. This indult, however, does not give rise to the *juspatronatus*, and the privilege of presentation must be interpreted strictly according to the tenor of the indult.⁶ It is to be noted that sometimes the person to be presented is designated by election. This is the case when the right of patronage is exercised by a college or body of patrons.⁷ It is likewise the case when several patrons have an individual right of presentation and cannot agree as to alternate presentation.⁸

The term *nomination* is sometimes used in a very general sense to signify any kind of provision for an ecclesiastical office. Hence it is often confused with election and presentation.⁹ In its strict sense, it signifies either the designation of a person for an ecclesiastical office which precedes formal presentation to the Superior, or the exercise of the right of presentation which is founded, not on the *juspatronatus*, but on an Apostolic indult.¹⁰ There are two kinds of nomination which can concur with election—consultory or less solemn nomination, and solemn nomination. The former is a sort of

⁵ *Ibidem*.

⁶ Can. 1471.

⁷ Can. 1460, § 1.

⁸ Can. 1460, § 2.

⁹ Maroto, *Institutiones Juris Canonici*, I, n. 610; Wernz, II, n. 352; Cappello, *De Censuris*, n. 153.

¹⁰ “*Strictiore vero sensu nominatio significat aut designationem personae promovendae, quae formali praesentationi personae Superiori factae praecedit aut exercitationem juris praesentandi, quatenus illud nititur privilegio apostolico, non jure patronatus.*” (Wernz, II, n. 352.)

inquiry, which precedes election properly so-called, by which several capable candidates are proposed, upon whom the electors vote. Solemn nomination is that by which two or more candidates are proposed by a body of electors and presented to the Superior who chooses one of them. In solemn nomination, it is not necessary that the persons who are to be presented be designated by election properly so-called. Any manner of designation which has the unanimous consent of all the electors present may be employed.¹¹

THE FORMER DISCIPLINE

The *vitandi* could not validly exercise the right of voting. Votes cast by the *tolerati*, however, were valid, unless exception was taken to their participation in the election.¹² No excommunicate could licitly present a candidate for an ecclesiastical office; if the excommunicate was a *vitandus*, the presentation was invalid and could not be admitted by the superior; if the excommunicate was a *toleratus*, the superior could admit the presentation, but he was not obliged to do so.¹³ The same was true of nomination.¹⁴

THE PRESENT LAW

All excommunicated persons are forbidden to exercise the right of election, presentation and nomination. The prohibition affects the *tolerati* as well as the *vitandi*. Acts, however, which are posited in violation of this prohibition, are not invalid, unless they are posited by the *vitandi* or the *tolerati* against whom a declaratory or condemnatory sentence has been pronounced.¹⁵

When the person to be appointed to an ecclesiastical office is designated by election properly so-called, a vote cast by a *vitandus* or a *toleratus post sententiam* is in-

¹¹ Maroto, *Institutiones Juris Canonici*, I, n. 610; Wernz, II, n. 352.

¹² Wernz, II, n. 357, not. 29; cf. c. 23, X, *de appellationibus*, etc., II, 28; c. unic., *ne sede vacante*, III, 8 in VI*.

¹³ Wernz, II, n. 440; cf. Suarez, *De Censuris*, disp. XIV, s. 2, n. 30ss.

¹⁴ Suarez, *De Censuris*, disp. XIV, s. 2, n. 32.

¹⁵ Can. 2265, § 2.

valid. The election itself, however, is valid, except in two cases: (1) when it is certain that the vote of the excommunicate was decisive, that is, when it is certain that without the vote of the excommunicate, the person elected would not have received a sufficient number of votes to gain the election; (2) when the excommunicate was knowingly (*scienter*) admitted to the election.¹⁶

It would seem by virtue of Canon 20 that the same principle would govern the cases in which the person to be presented or nominated for an ecclesiastical office is determined by vote.

II. ACQUISITION AND PRIVATION OF DIGNITIES, ETC.

CANON 2265, § 1, n. 2.

Quilibet excommunicatus nequit consequi dignitates, officia, beneficia, pensiones ecclesiasticas aliudve munus in Ecclesia.

CANON 2266.

Post sententiam condemnatoriam vel declaratoriam excommunicatus manet privatus fructibus dignitatis, officii, beneficii, pensionis, numeris, si quod habeat in Ecclesia; et vitandus ipsamet dignitate, officio, beneficio, pensione, munere.

A *dignity* is generally a benefice to which, besides the prerogatives of honor and precedence, there was formerly attached some jurisdiction in the external forum. At the present time, a dignity very seldom carries with it any jurisdiction.¹⁷

The term *ecclesiastical office* has already been considered.¹⁸

A *benefice* is a juridical being constituted or erected *in perpetuum* by competent ecclesiastical authority, con-

¹⁶ Can. 167, § 2.

¹⁷ Vermeersch-Creusen, *Epitome*, I, n. 449; Cappello, *De Censuris*, n. 154; Chelodi, *Jus de Personis*, n. 204; Augustine, *Commentary*, II, p. 426.

¹⁸ *Supra*, pp. 140-141.

sisting of a sacred office and the right of receiving the revenue from the endowment of the office.¹⁹

An *ecclesiastical pension* may be described as the “*jus percipiendi partem fructuum alicujus beneficii vel mensae, titulo non perpetuo.*”²⁰

The term *aliudve munus* may be understood of any office or duty that is constituted or exercised for a spiritual purpose.²¹

THE PRE-CODE DISCIPLINE

Under the law of the Decretals,²² excommunicates were incapable of acquiring any benefice, or ecclesiastical office whatsoever. The reason for this was because excommunicates were forbidden to exercise ecclesiastical offices and to communicate with the faithful. Hence with reason were they excluded from the acquisition of any position which required the performance of ecclesiastical functions and communication with the people.²³ It was the common teaching of canonists that this exclusion extended even to the *tolerati*. D'Annibale, however, against the opinion which he himself admitted to be the commonly accepted one, raised some doubt about the incapacity of the *tolerati* to acquire benefices, offices, etc. He thought it more reasonable to hold that the *tolerati* were capable of acquiring benefices, etc.²⁴ Wernz saw in this proposal of D'Annibale merely an effort to bring about a change in the *jus vigens*. Wernz admitted that many and grave inconveniences could arise from the fact that the appointment of an occult excommunicate to a benefice, office, etc. was invalid. He suggested that this could be remedied by making such an appointment invalid only in the case of an excommunicate *post sen-*

¹⁹ Can. 1409.

²⁰ Vermeersch-Creusen, *Epitome*, I, n. 207; cf. Reiffenstuel, lib. III, tit. 5, n. 84ss.

²¹ Cappello, *De Censuris*, n. 154.

²² Cf. Schmalzgrueber, pars IV, tit. XXXIX, n. 147ss.; Suarez, *De Censuris*, disp. XIII; Wernz, VI, n. 193.

²³ Schmalzgrueber, *loc. cit.*

²⁴ *Summula Theologiae Moralis*, I, n. 365.

tentiam.²⁵ It will be seen that the Code has followed this suggestion.

Pensions granted for the exercise of some spiritual function could not be conferred validly upon excommunicates, for all excommunicates were forbidden to perform any ecclesiastical function. There was disagreement among authors concerning pensions granted for some reason other than the exercise of spiritual functions, ex. gr., to a cleric who resigned a benefice, to one not having sufficient sustentation otherwise. Some maintained that such pensions could not validly be conferred upon excommunicates, while others were of the affirmative opinion.²⁶

Excommunicates were not *ipso facto* deprived of the benefices, offices, etc., which they had obtained before incurring the censure. It was disputed among authors whether they were *ipso facto* and *ante sententiam* deprived of the fruits of benefices, offices, etc.²⁷

THE PRESENT LAW

The Code sets forth the legislation concerning excommunicates and the acquisition and privation of ecclesiastical dignities, offices, benefices, pensions, etc., in such clear and unmistakable terms that very little comment will have to be made upon it.

No excommunicate can acquire dignities, offices, benefices, ecclesiastical pensions, or any other position in the Church. The acquisition of such, however, is not invalid, except in the case of a *vitandus* or a *toleratus* against whom a declaratory or condemnatory sentence has been passed (Can. 2265, § 2).

After a condemnatory or declaratory sentence, an excommunicate is deprived (*manet privatus*) of the fruits of a dignity, office, benefice, pension, or any other position he may have in the Church (Can. 2266). This priva-

²⁵ VI, n. 193, not. 306.

²⁶ Cf. Schmalzgrueber, pars IV, tit. XXXIX, n. 153.

²⁷ Cf. c. 53, X, *de appellationibus*, II, 28; Schmalzgrueber, pars IV, tit. XXXIX, n. 158; Suarez, *De Censuris*, disp. XIII, s. 2, n. 18a; Wernz, VI, n. 193; Holweck, pp. 121-122, § 47, not. 6.

tion is incurred by the very fact that a condemnatory or declaratory sentence has been issued against the person. No specific sentence to this effect is required. Most canonists are of the opinion that in the case of a declaratory sentence, this privation retroacts to the time when the censure was incurred.²⁸ They base their opinion on Canon 2232, § 2, which states: "*Sententia declaratoria poenam ad momentum commissi delicti retrotrahit.*" Vermeersch-Creusen, however, maintain that the privation does not retroact to the time of the commission of the delict. They argue from the very wording of the canon, "*post sententiam . . . manet privatus.*"²⁹ Cocchi seems to be of the same opinion.³⁰ This latter opinion seems to be probable not only extrinsically by reason of the authors who embrace it, but also intrinsically by reason of the wording of the canon "*post sententiam . . . manet privatus.*"

III. THE RECEPTION OF ORDERS

Quilibet excommunicatus promoveri nequit ad ordines.

Orders may be defined as "*Sacramentum Novae Legis quo spiritualis traditur potestas et confertur gratia ad conficiendam Eucharistiam, aliaque ecclesiastica munia rite obeunda.*"³¹ There are seven orders, three of which are called major or sacred orders and the remaining four are called minor orders. The three major or sacred orders are subdeaconship, deaconship and priesthood: the priesthood comprises the dignity of simple priest and that of bishop. The four minor orders are those of porter, lector, exorcist and acolyte.

Episcopal consecration, priesthood and deaconship are sacraments, that is, *rationem habent sacramenti*.³²

²⁸ Cappello, *De Censuris*, n. 157; Ohelodi, *Jus Poenale*, n. 88; Augustine, *Commentary*, VIII, p. 192; Ayrinhac, *Penal Legislation*, p. 74.

²⁹ *Epitome*, III, n. 468.

³⁰ *Commentarium*, VIII, n. 88.

³¹ Tanquerey, *Synopsis Theologiae Dogmaticae*, III, n. 797.

³² Cf. C. of Trent, sess. XXIII, can. 3-4; Gasparri, *De Sacra Ordinatione*, n. 39; Pesch, *Praelectiones Dogmaticae*, VII, n. 597ss., n. 606ss., 613ss.; Tanquerey, *Synopsis Theologiae Dogmaticae*, III, n. 808-814.

Whether subdeaconship and the minor orders are sacraments was at one time a much debated question. It would seem that the negative opinion is more commonly accepted by theologians at the present time.³³ The defenders of this opinion argue that these orders are of ecclesiastical origin and that the Church cannot attach grace to an external sign; furthermore, in the conferment of subdeaconship and the minor orders, there is no imposition of hands which is an essential rite of the Sacrament of Orders.³⁴

There is a ceremony called Tonsure which serves as a preparation for the reception of orders. It is a sacred rite, instituted by the Church, by which a man is enrolled among the clergy and dedicated to God in a special manner that he might dispose himself for the reception of orders.³⁵ Tonsure is not a sacrament; it is not even an order. However, according to Canon 950, in law the terms *ordinare*, *ordo*, *ordinatio*, *sacra ordinatio* comprehend, besides episcopal consecration and the three major and the four minor orders, the first tonsure, unless the contrary is evident from the nature of the matter or from the context.

The very nature of the censure of excommunication has always forbidden those under its ban to receive orders. Excommunication separates one from communication with others, especially in divine matters. Hence since the various clerical orders are directed to communication in divine matters with others, it is clear that no excommunicate can licitly receive orders.³⁶ In the very rite of ordination, excommunicates are forbidden under pain of excommunication to approach to receive orders.³⁷

³³ Perrone, *Praelectiones Theologicae*, VII, *Tractatus de Ordine*, cap. II, n. 81; Franzelin, *Tractatus de Divina Traditione et Scriptura*, sect. II, cap. II, th. XVII; Gasparri, *De Sacra Ordinatione*, n. 41; Pesch, *Praelectiones Dogmaticae*, VII, n. 585ss., 592ss.

³⁴ Tanquerey, *Synopsis Theologiae Dogmaticae*, III, n. 815.

³⁵ Tanquerey, *Synopsis Theologiae Dogmaticae*, III, n. 840.

³⁶ Gasparri, *De Sacra Ordinatione*, n. 141.

³⁷ Pontificale Romanum, tit., *De Ordinibus Conferendis*.

Innocent III wrote of those who had incurred excommunication for laying violent hands upon clerics who, "ecclesiasticam sententiam negligentes, in excommunicatione positi ecclesiasticos ordines accipere non formidant." He decreed that a secular cleric who knowingly did so was to be deposed; a religious was to be suspended from the exercise of the order. If a secular cleric, thus excommunicated, ignorant either of the law or of the fact, received orders, only the Pope could dispense him; if a religious did so under the same circumstances the abbot could dispense him, if ignorance could be presumed and the fact was not grave.³⁸

Canon 2265, § 1, n. 3 states that no excommunicate can be promoted to orders. The term *ordines* in this canon comprises episcopal consecration, the three major and the four minor orders and even tonsure.³⁹ The canon under discussion is very closely connected with Canon 2260, which denies to excommunicates the passive use of the sacraments and sacramentals. However, it is more extensive than Canon 2260. Canon 2260 forbids the reception of the sacramentals only to excommunicated persons against whom a declaratory or condemnatory sentence has been pronounced. Canon 2265, § 1, n. 3 forbids all excommunicates to receive even tonsure, the minor orders and subdeaconship, which are, according to the more common opinion, sacramentals and not sacraments.

Orders received by excommunicates are valid. This is true not only of those orders whose reception constitutes a sacrament, that is, episcopal consecration, priesthood and deaconship, but also of subdeaconship, minor orders and tonsure. The validity of the former depends on what is required by divine law; the validity of the latter depends on the requisites of ecclesiastical law; and the Church has not placed freedom from excommunication as an essential condition for their valid reception.⁴⁰

³⁸ C. 32, X, *de sententia excommunicationis*, V. 39.

³⁹ Can. 950; Cocchi, *Commentarium*, VIII, n. 87; Blat, *Commentarium*, V, *De Delictis et Poenis*, n. 92; Augustine, *Commentary*, VIII, p. 191.

⁴⁰ Cf. Blat, *Commentarium*, V, *De Delictis et Poenis*, n. 92.

IV. PONTIFICAL RESCRIPTS

Quod si haec sententia lata fuerit, excommunicatus nequit praeterea gratiam ullam pontificiam valide consequi, nisi in pontificio rescripto mentio de excommunicatione fiat.

A rescript is a response given in writing by the Holy See or an Ordinary to a question asked or a favor requested.⁴¹ It will be necessary for our purpose to take into consideration the division of rescripts *ratione objecti* into rescripts of justice and rescripts of grace. A rescript of justice is a response which contains a provision relating to a judicial controversy or to the administration of justice. A rescript of grace is one that contains a favor; it may grant a simple grace, privilege or a dispensation.⁴²

Under the law of the Decretals, excommunicates were *ipso jure* incapable of validly acquiring any pontifical rescript either of justice or of grace.⁴³ This disability affected all excommunicates without exception, the *tolerati* as well as the *vitandi*, occult excommunicates as well as those whose excommunication was a matter of public knowledge.⁴⁴ There were exceptions to this rule with regard to rescripts relating to the cause of excommunication and appeal from it.⁴⁵ Therefore, lest on account of excommunication, a rescript be invalid, it was the practice of the Roman Curia to absolve the petitioners *ad cautelam* from censures, but only to the effect that the rescript might be valid—"ad effectum dumtaxat gratiae consequendae."⁴⁶

Absolution *ad cautelam* is an absolution which exercises its influence only in cases in which there is a censure

⁴¹ Cf. Can. 36, § 1; Wernz, I, n. 150; Vermeersch-Oreusen, *Epitome*, I, n. 123; Augustine, *Commentary*, I, p. 124.

⁴² Can. 62.

⁴³ C. 26, X, *de rescriptis*, I, 3; c. 1, *de rescriptis*, I, 3 in VI°

⁴⁴ Wernz, I, n. 151; Chelodi, *Jus de Personis*, n. 76.

⁴⁵ "Ipso jure rescriptum, vel processus per ipsum habitus, non valeat, si ab excommunicato super alio quam excommunicationis vel appellacionis articulo fuerit impetratum." C. 1, *de rescriptis*, I, 3 in VI°.

⁴⁶ Wernz, I, n. 151.

which would otherwise invalidate the rescript: it is an absolution only for its proper effect, that is, it does not remove the censure completely and absolutely, but only, as it were, *secundum quid*. It simply causes the censure to be no longer a hindrance to the valid attainment of a rescript and leaves the other effects of the censure as they were.⁴⁷

At one time, this absolution *ad cautelam* did not benefit those who had incurred excommunication either *a jure* or *ab homine* for certain delicts mentioned in the Rules of the Apostolic Chancery, and “per quatuor menses scienter excommunicationis sententiam sustinuerint (insorduerint).” In like manner it did not benefit persons who had contumaciously lived under any censure for the period of a year (*insorduerint*).⁴⁸ However, the number of persons who were excluded from this benefit of absolution *ad cautelam* was greatly reduced by the Constitution “*Apostolicae Sedis*,” which abrogated many of the *latae sententiae* censures formerly in vogue. Furthermore, it would seem that persons who had lived contumaciously under censure for a year were deprived of the benefit of absolution *ad cautelam* only if they had been publicly excommunicated and nominally denounced.⁴⁹

A rather interesting response was given by the Sacred Penitentiary on September 8, 1898. A certain priest, while under ban of a reserved excommunication that was occult, had asked and obtained from the Roman Congregations rescripts granting minor graces, ex. gr., to read forbidden books, to bless rosaries, etc. with the application of indulgences, etc. Hearing that excommunicates were incapable of obtaining Papal graces, he became somewhat disturbed, and the following questions were proposed: (1) whether such rescripts obtained while under ban of excommunication were valid; (2) in case

⁴⁷ DeSmet, *De Sponsalibus et Matrimonio*, n. 878, not. 2.

⁴⁸ Reg. 66.

⁴⁹ Wernz, I, n. 151, not. 31; Konings-Putzer, *Commentarium in Facultates Apostolicas*, n. 46.

they were invalid, how should the priest conduct himself in order not to manifest the reason why the rescripts were invalid. The Sacred Penitentiary replied: "Orator super praemissis acquiescat. Pro foro conscientiae tantum."⁵⁰

It was the *Normae Peculiares* of the Roman Curia, published in conjunction with the Constitution "*Sapienti consilio*," that effected an important change in this matter. In Chapter III, n. 6 of the *Normae Peculiares*, it was decreed that all favors and dispensations granted by the Holy See after November 3, 1908, on which day the Constitution "*Sapienti consilio*" began to have the force of law, were valid and legitimate, even if granted to persons under ban of censure, with the exception of those who were nominally excommunicated, or whom the Holy See had nominally suspended *a divinis*.⁵¹

Hence no longer were all excommunicates incapable of validly acquiring Papal rescripts. After November 3, 1908, this disability affected only those who were nominally excommunicated. A person was considered to be nominally excommunicated when the Superior, either expressly mentioning him by name, or otherwise designating him that he could not be confounded with others, declared that he was under ban of excommunication. It did not matter whether the declaration came from the Holy See or another competent ecclesiastical authority, nor whether the excommunication was incurred only at the time of the declaration, or previously.⁵²

This legislation with but few changes has been incorporated into the Code.

Canon 36, § 2 states that all graces and dispensations granted by the Holy See, even to those under censure,

⁵⁰ *Analecta Ecclesiastica*, 1903, t. XI, p. 421.

⁵¹ *AAS*, I, (1909); " * * * a die III mensis Novembris MDCCCXVIII, quo die incipient vim legis habere praescripta in constitutione *Sapienti consilio*, gratiae ac dispensationes omne genus a Sancta Sede concessae, etiam censura irretitis, ratae ac legitimae, nisi de iis agatur qui nominatim excommunicati sint, aut a Sancta Sede nominatim pariter poena suspensionis a divinis multati."

⁵² Martin, *The Roman Curia*, pp. 268-269.

are valid, with due regard, however, to Canons 2265, § 2, 2275, n. 3, and 2283. Our present interest concerns Canon 2265, § 2, which says that if a declaratory or condemnatory sentence has been pronounced against an excommunicate, he cannot validly obtain any pontifical *favor*, unless mention is made of the excommunication in the pontifical rescript.

Some doubt may arise as to whether Canon 2265, § 2 is meant to include privileges and dispensations.⁵³ Canon 36, § 2 and Canon 62 give rise to this doubt. The former expressly distinguishes between graces and dispensations, while the latter expressly distinguished between a simple grace, dispensation and privilege. It seems certain, however, that Canon 2265, § 2 has reference not only to simple graces or favors, but likewise to privileges and dispensations as well. The words *gratia ulla* indicate this, for privileges and dispensations are commonly included under the name of graces and favors.⁵⁴

With regard to the excommunicates who are excluded from validly obtaining papal favors, the Code is substantially in conformity with the *Normae Peculiares*, published in conjunction with the Constitution "*Sapienti consilio*." As has been seen, the latter excluded all persons who were excommunicated by name. The Code excludes the *vitandi* and the *tolerati* against whom a declaratory or condemnatory sentence has been pronounced.

Rescripts of grace granted by the Holy See to the *vitandi* or the *tolerati* against whom a declaratory or condemnatory sentence has been issued are invalid "unless, in the Papal rescript, mention be made of the censure, implying that the concession is made in spite of it or unless an absolution from censures, called *ad effectum*, be inserted in the rescript for the purpose of securing its validity."⁵⁵

⁵³ Cappello, *De Censuris*, n. 157; Cocchi, *Commentarium*, VIII, n. 88.

⁵⁴ Cappello and Cocchi, *loc cit.*

⁵⁵ Ayrinhac, *Penal Legislation*, p. 126.

There is question in the legislation under discussion only of pontifical graces, that is, graces and favors granted either directly by the Pope, or by a Congregation of the Roman Curia. Hence favors that might be conceded to excommunicates by an authority inferior to the Holy See would not be null by virtue of Canon 2265, § 2.⁵⁶

It may be noted here that notorious excommunicates cannot validly be received into associations of the faithful, such as, secular tertiary orders, confraternities and pious unions.⁵⁷ Should a member of such associations become a notorious excommunicate, after due warning he should be expelled in the manner provided in the statutes; such a one, however, retains the right of having recourse to the Ordinary.⁵⁸

⁵⁶ Cappello, *De Censuris*, n. 157; Chelodi, *Jus Poenale*, n. 38; Cocchi, *Commentarium*, VIII, n. 88.

⁵⁷ Can. 693, § 1.

⁵⁸ Can. 696, § 2.

CHAPTER VIII.

INDIRECT EFFECTS OF EXCOMMUNICATION

Besides the immediate or direct effects of excommunication which have just been discussed at length, it remains to say a few words concerning two other effects which excommunication can produce, namely, irregularity and the suspicion of heresy. These are called mediate or indirect, sometimes remote, effects of excommunication, that is, they do not follow immediately or directly from the censure, but they are brought about only when the person under ban of excommunication occasions them.

I. IRREGULARITY

An irregularity is a canonical impediment, of itself perpetual, which *per se* and primarily forbids the reception of orders, and secondarily their exercise.¹ Irregularities are divided into irregularities *ex defectu* and irregularities *ex delicto*.² The irregularity *ex defectu* results from certain defects which would be unbecoming in one performing the functions of the sacred ministry. The irregularity *ex delicto* arises from certain delicts which render the guilty one unworthy to receive or to exercise orders.³ An irregularity *ex delicto* is not contracted unless the delict was a grave sin, committed after baptism (except in the case of one, who, outside extreme necessity, allowed himself to be baptized by a non-Catholic), and likewise external, whether public or occult.⁴

Canon 985, n. 7 states that they are irregular *ex delicto* who, either without the order, or prohibited from its

¹ Vermeersch-Creusen, *Epitome*, II, n. 252.

² Cf. Can. 983.

³ Hickey, *Irregularities and Simple Impediments*, p. 13.

⁴ Can. 986.

exercise by an canonical punishment, place an act of orders that is reserved to a cleric constituted in sacred orders. In the pre-Code discipline there was an irregularity attached to the violation of a censure. No mention is made of this irregularity in the Decree of Gratian and in parts of the Decretals it is not newly introduced but presupposed.⁵ Hence it would seem that this irregularity arose rather from custom than from written law.⁶

In the first place, it may be noted that the irregularity spoken of in Canon 985, n. 7 affects not only members of the clerical state, but laymen as well. Consequently, laymen and clerics, not in sacred orders, become irregular if they exercise an order reserved to one in sacred orders. However, our present interest in Canon 985, n. 7 concerns the irregularity which results from a violation of some of the effects of excommunication, and this irregularity is contracted only by clerics in sacred orders. Should an excommunicate in sacred orders place an act of sacred orders that is forbidden him by the censure, he becomes irregular *ex delicto*. Of course, an excommunicate in sacred orders who exercises the functions of sacred orders under the circumstances laid down in Canon 2261, § 2 and § 3 does not contract an irregularity.

II. SUSPICION OF HERESY

Formerly one who contumaciously remained under excommunication for a year (*insordescibat*) was subject to certain extraordinary effects, such as the privation of a benefice *per sententiam*,⁷ suspicion of heresy,⁸ and invocation of the secular arms.⁹

⁵ C. 10, X, *de cler. excom.*, V, 27; c. 1, *de sent. et re jud.* II, 14 in VI°; c. 1, 18, 20, *de sent. excom.*, V, 11 in VI°.

⁶ Wernz, II, n. 136, not. 334.

⁷ Cf. c. 8, X, *de act. et qual. ord.* I, 14; Suarez, *De Censuris*, disp. XVII, s. 1, n. 7; Schmalzgrueber, pars IV, tit. XXXIX, n. 197; Ballerini-Palmieri, *Opus Theologicum Morale*, VII, n. 374ss.; Wernz, VI, n. 197; Crnica, *Modifikationen in Tractatu de Censuris*, p. 103.

⁸ C. 13, X, *de haeret.* V, 7; c. 13, X, *de poenis*, V, 37; c. 7, *de haeret.* V, 2 in VI°; Conc. Trid., sess. XXV, *de ref.*, c. 3.

⁹ C. 2, X, *de cler. exo.* V, 27; Wernz, VI, n. 197; Crnica, *op. cit.*, p. 103.

At the present time, according to Canon 2340, § 1, one who continues obstinately in the censure of excommunication for a year is suspected of heresy. This suspicion of heresy arises from this that one who contumaciously remains under the censure of excommunication for a year seems to condemn the authority of the Church and to think little of the spiritual goods of which he is deprived by the censure.¹⁰ In order that this suspicion of heresy arise, it would seem that the excommunication must be notorious at least by fact.¹¹ Cipollini, however, is of the opinion that this suspicion of heresy affects only the *vitandi* and the *tolerati* against whom a condemnatory or declaratory sentence has been pronounced. “*Nam hujusmodi praesumptio fori externi est et juridica praesumptio, quae non sustinetur nisi in foro externo, nisi scilicet juridice constet eum esse excommunicatum. At quomodo de hoc constabit sine sententia?*”¹²

Those who are suspected of heresy are to be warned to remove the cause of the suspicion; if they neglect to do so, they are to be prohibited from legitimate acts, and besides this, a cleric, who does not heed a second admonition, is to be suspended *a divinis*; if those who are suspected of heresy do not amend within six months after they have contracted the penalty, they are to be considered as heretics, subject to the punishments of heretics.¹³

¹⁰ Cf. Suarez, *De Censuris*, disp. XVII, s. 1, n. 6; Sole, *De Delictis et Poenis*, n. 369; Cipollini, *De Censuris Latae Sententiae*, n. 71; Vermeersch-Creusen, *Epitome*, III, n. 539.

¹¹ Cocchi, *Commentarium*, VIII, n. 180; Vermeersch-Creusen, *Epitome*, III, n. 539.

¹² *De Censuris Latae Sententiae*, n. 71.

¹³ Can. 2315.

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ABBREVIATIONS

AAS—*Acta Apostolicae Sedis*.

ASS—*Acta Sanctae Sedis*.

Coll. S. C. P. F.—*Collectanea S. Congregationis de Propaganda Fide*.

Fontes—*Codicis Juris Canonici Fontes*.

MPG—MIGNE, J. P., *Patrologiae Cursus Completus—Series Graeca*.

MPL—MIGNE, J. P., *Patrologiae Cursus Completus—Series Latina*.

S. C. S. Off.—*Sacra Congregatio Sancti Officii*.

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**CATHOLIC UNIVERSITY OF AMERICA
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No. 50

The Third Order Secular of St. Francis

A DISSERTATION

**SUBMITTED TO THE FACULTY OF CANON LAW OF THE
CATHOLIC UNIVERSITY OF AMERICA IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR
THE DEGREE OF DOCTOR IN CANON LAW**

BY

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FOREWORD

The Third Order Secular of St. Francis is a society which has been favored and urged forward by the Holy See perhaps more than any other lay association. Many of the recent Pontiffs have declared that it is *the* institution upon which the Church bases her hope of general salvation, because its principles are so conducive to law and order not only in reference to the spiritual, but to the temporal and civil as well. It was with this thought in view that Leo XIII declared that 'my social reform is the Third Order of St. Francis.'

Several canonical treatises on this institution of the Church have already been written. The purpose of the present work is to explain more in detail the various papal pronouncements on this wide-spread institution of the Catholic Church, and thus to give a more comprehensive idea of its organization and government in conformity with the great number of decrees which have emanated from the Holy See, as well as with the present Code of Canon Law.

The legislation in regard to the Third Order was changed very little by the Code: hence it is to be hoped that the numerous citations of papal *decrees*, rather than canons, will not convey the impression that too much latitude has been given to the historical side of the question, even in the part which treats of the present canonical legislation.

The definition and purpose of the Order has been treated in the canonical part, with the thought in view that the reader will have gained a comprehensive idea of this by a perusal of the historical development of the institution. The original Rule of the Order, or, the *Regula Antiqua*—as well as the *Rule of Leo XIII*—are given *in extenso* in the appendix, in order that a ready reference may be had to the citations. Italics, unless otherwise stated, are to be considered those of the present writer.

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PART 1

THE HISTORICO CANONICAL DEVELOPMENT OF THE THIRD ORDER SECULAR

Authors agree that the monks of St. Benedict were the forerunners, if indeed they were not the first, to propagate the idea of the laity being in some manner connected with the monasteries and abbeys of the religious, both in a spiritual and material manner. Any great organization is not momentarily conceived and immediately put into effect as a *successful* culmination of that idea. It is rather the effect of time and the previous experience of years that have always influenced great movements and trends in the various institutes of the Catholic Church. There is no doubt that St. Francis was the first to organize completely and successfully to accomplish the union of the secular with the religious, the feasibility of a religious life in the world, with rules that at the same time allow the continuance of family life and its necessary contact with the world. "What till then no founder of a religious order had thought of—to make the religious life common property—he [Francis] was the first to devise and, by God's favor, to successfully accomplish * * *"¹

But at the same time it must be admitted that the great monastic leaders—fore-runners of St. Francis—planted the seed which he later cultivated and brought into full bloom

¹Benedict XV, const. *Sacra propediem*, Jan. 6, 1921 (A. A. S. [1921], XIII, 34).

under the able guidance and leadership of Cardinal Ugolino who later became Pope Gregory IX.²

Therefore a brief history of the various lay associations which preceded the Third Order Secular of St. Francis will give a better understanding of its foundation and government.

CHAPTER I

THE SECULAR OBLATES OF ST. BENEDICT

The name *oblate* in its strict sense signifies that which is offered or brought. In the early days of monasticism young children were brought to the abbeys and offered to the service in much the same manner as the first-born in the Old Testament. In the Rule of St. Benedict there is a provision made for parents to bring their child to the monastery with an offering and they were obliged to 'make a written document and swear under oath never to give him anything or the means to acquire anything; or if they are unwilling to do this then let them make an oblation to the monastery and they can receive the income thereof during their life.'³

Besides the cloistered oblates and monks who lived a com-

²"In quo egregiam ei operam navavit, ut accepimus, Cardinalis Ugolinus, is qui deinde, Gregorii IX sibi imposito nomine * * *" (*o. c.*, 35); cf. Cocchi, *Commentarium*, IV, n. 185; Chelodi, *Jus de Personis*, n. 302; that the monastic forerunners of St. Francis, especially the Benedictines, exerted influence on the foundation of the Third Order Secular of St. Francis is also affirmed by: Prümmer, *Manuale Juris Canonici*, Q. 270; Thurston, "Scapulars", *The Month* [1927], CXLIX, p 484 f; Augustine, *A Commentary*, III, p 443 f; concerning the influence of the Humiliates on the Franciscan Third Order, cf. *A. F. H.*, VI, p 173 f; a complete treatise on this subject is given by Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens (Franziskanische Studien, Beiheft VIII)*.

³Butler, *Regula Monastica*, chap. IV, 105.

munity life at an abbey under the obedience of an abbot, there was a custom among pious Christians of offering themselves and their goods to the monastery and then to remain at home; married people also lived at home but according to the Rule of the Order. This happened not only among the Benedictines themselves, but also among the various branches of the Benedictine Order. Already at the time of St. Benedict and Maurus such persons formed themselves into a brotherhood with the order. As the Benedictine Order spread, many of the laity desired to have some connection with it in order to acquire a brotherhood with the monks and to be the adopted children of St. Benedict.⁴

The institute of Oblates received its development in the monasteries of Hirschau in the eleventh century; but the real origin was not in these places and historical documents available do not give sufficient matter to establish this in an exact manner. There was no fixed order in the beginning: the monks, retired from the world, could not prepare themselves for their relations with it which later became necessary. Their liturgy and influence were not sufficiently developed to assure them of social influence. But after the invasion by the barbarians the Church demanded that they should take to the conquest of new peoples, and by their preaching subdue them to the yoke of the Gospel. Kings and princes made it a point of honor to multiply the centers of monastic life; cities really formed around the monasteries and the inhabitants cultivated the monastic domains.⁵

Mabillon says that the Benedictine Rule admitted in principle indistinctly children and adults, youths, poor as well as rich, nobles as well as common people, serfs as well as

⁴Beringer, *Die Ablässe*, II, n. 409; cf. Heimbucher, *Die Orden und Kongregationen der Katholischen Kirche*, I, p 271.

⁵"Les Oblats", *Revue Benedictine*, III [1886-1887], p 58.

free, learned as well as the ignorant, the laity as well as the clergy.⁶

The Rule of St. Fructus, chapter six, bears this title: "How men can live without peril in a monastery with their wives and children." Then the Rule goes on to state that when a married couple present themselves to the abbot they are to submit to his authority, and can have no more clothing than necessary. The parents should instruct their children in the Rule and are not to speak to them unnecessarily.⁷

Another institution of the Benedictines was that of virgins and widows who were consecrated to God but lived with their families.⁸

Again there are many instances of families retiring near a monastery and making a donation of their goods to the abbey, for which in return they received their sustenance and a share in the prayers and good works of the monks. As early as 817 St. Benedict of Aniane attempted in the following words to put an end to the custom of allowing laity and clerics in the monasteries: "Laity and clerics are not allowed to be received into the monastery unless they wish to become monks"; however, it seems that this admonition was not generally observed.⁹ Although this may have been an abuse, it nevertheless proves the desire of people in the world to be connected in some manner with the religious life.

That the laity were allowed to live *near* the abbeys can be seen from the records of the ninth century, in which Wildebald is described as giving his goods to the monastery and being employed to care for travelers. As a condition of his donation, he demanded to live in the guest house and to

⁶O. c., 59.

⁷Migne, P. L., LXXXVII, 1115 f.

⁸"Les Oblats", o. c., p 109.

⁹This prohibition was made at the Synod of Aixle Chapelle ("Les Oblats", o. c., p 107).

receive food and clothing for the remainder of his life."²

The early oblates may be grouped into four classes:

1st class: Laity who pledged themselves to the service of the monastery and lived near it after promising obedience to the abbot.

2nd class: Seculars who served the monasteries although remaining with their families and retaining ownership of their goods on condition of giving an annual sum to the monastery. It appears that this sacrifice was made in order to be near the monastery, to share in its merits, to help with the prayers and to be under the influence of the monks.

3rd class: Persons who made a donation of their goods to the monastery and received their subsistence either at the abbey itself or in their own homes.

4th class: Those who made a donation of their goods to the monks, but received them back by a new title of benefice, of which they reserved to themselves the use and usufruct."³

At the end of the twelfth century, the third class at the monastery of Admont was composed of a number of 'fratres obedientiarii,' i. e. a group of lay people who voluntarily submitted themselves to the service of the religious without any monastic profession."⁴ Some classes bound themselves more strictly than others."⁵ At times women would retire near a monastery, assist in the making of sacred vestments, and the care of the poor *at their own expense*;"⁶ hence the vow of poverty was certainly not embraced by this class.

This short history conveys at least some idea of the tendency on the part of the laity from early monastic times, to

²*Ibidem*, p 108.

³*Ibidem*, p 159; Du Cange, *Glossarium ad Scriptores*, s. v. Oblati, Donati.

⁴"Les Oblats", *o. c.*, p 209 f.

⁵Cf. Migne, *P. L.*, CXLIII, 347.

⁶"Les Oblats", *o. c.*, p 216.

connect themselves in some manner with the religious life in order to derive spiritual benefit. The Abbeys of Monte Cassino and Subiaco possessed this institution in the fourteenth and fifteenth centuries and have since perpetuated it. But due to the fact that the Rules and the manner of receiving Oblates had varied according to time and place, the General Chapter of the Benedictine Order in 1590 desired new regulations, which were subsequently edited and printed at Palermo in 1628. These Rules were then made obligatory in the various abbeys and have been the groundword for all subsequent editions."

The following is a summary of their contents:

1. The Oblates are God-fearing Christians who desire, while living in the world, to live a more perfect life according to the spirit of the Benedictine Order.

2. Application requirements: The applicant must be twenty years of age, must have led a blameless life, and show love for St. Benedict and his Order.

3. Investiture: Three months after application the applicant receives the black scapular either from the abbot or his delegate; this investiture should occur in all seriousness and in a solemn manner.

4. Oblation: The act of oblation by which the applicant (now a novice) offers himself to the cloister, is made one year after investiture and resembles the regular profession. It is made in writing, is signed at the altar and is preserved in the archives. With this oblation a candle is also offered to signify that the oblate furthermore wishes to offer some of his temporal possessions.

5. Conversion of morals: A summarized Rule of life was also drawn up at the Chapter.

"*Ibidem*, p 252; Heigl, "Die Weltlichen Oblaten des heiligen Benedictus", *Studien und Mittheilungen aus dem Bened. Orden*, II, p 359.

6. Pious works, such as the reception of monthly communion, certain prayers on fixed days, and the special veneration of Benedictine saints are to be cultivated."

On January 17, 1871, the Congregation of Bishops and Regulars approved a new Rule for the Oblates, which was subsequently approved by the Sacred Congregation of Rites, June 4, 1888." The Indulgences which were granted from 1888 to 1896 to the Oblates of Monte Cassino" were increased in 1898 and extended to all Secular Oblates of St. Benedict. Finally, July 23, 1904, Pius X approved anew the statutes, indulgences and privileges of the institute."

The Congregation of Indulgences has declared that the present status of the Secular Oblates is practically the same as that of secular Tertiaries."

"Heigl, *o. c.*, p 359-362.

"A. S. S., XXVII, 440; Tachy, *Les Tiers Ordres*, p 12; Beringer, *Die Ablässe*, II, n. 409.

"E. g., by the S. C. of Indulgences Apr. 27, 1895 (*M. E.*, 9, Ser. I, vol. IX, 199 f).

"Beringer, *Die Ablässe*, II, n. 409; *Manual for Secular Oblates of St. Benedict*, p 24 f.

"Jan. 15, 1895 ad I (*A. S. S.*, XXVII, 440 f).

CHAPTER II

THE PREMONSTRATENSIAN MOVEMENT

Almost from the very beginning the Order of Premontre founded by St. Norbert in 1121 consisted of the following classes: (a) priests and clerics under an Abbot or provost, known as the Canons Regular; (b) nuns who embraced the Rule of life as laid down by St. Norbert; (c) people who lived in the world, wore the white habit under their clothing and conformed their lives to the spirit of the Order.¹

History relates that in 1128 Count Theobald came to Norbert with the purpose of giving his riches to the monastery and becoming a monk; but Norbert felt that he could accomplish more good in the world by being merely *affiliated* with the first Order, and he therefore invested Theobald with a white scapular as a symbol of the bond which united him to the Norbertine Order.² The institute thus founded was termed 'Fratres et Sorores ad Succurrendum'; it seems that this institution did not have the name of a Third Order until the foundation of the Third Orders by St. Francis and Dominic.³

¹Kirkfleet, *History of St. Norbert*, p 106; Heimbucher, *Die Orden und Kongregationen der Katholischen Kirche*, II, p 58.

²Kirkfleet, *o. c.*, Le Paige, *Bibliotheca Praem. O.*, I, 311; Heimbucher, *l. c.*

³According to Le Paige, *l. c.*, Norbert gave them 'regulas quasdam'; cf. also ASs., June, I, pp 920-923; Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens (Franziskanische Studien, Beiheft VIII)* p 49 f.

Following the example of Theobald, many nobles as well as common people became affiliated with the Order of Premontre. The early Rules of the society which thus developed are the following: After postulants had received the scapular or white habit from the hands of the Abbot, their names were registered by the sacristan in the book of the fraternity. From this time onward, their obligations consisted in the daily recitation of a number of *Paters* and *Aves* in place of the canonical hours of the monks; they confessed and communicated at least seven times a year on the principal feasts. In addition to the fasts appointed by the Church, they were to fast on every Friday of the year, and to abstain during the time of Advent. These Rules did not bind under sin: the members merely bound themselves to the acceptance of the penance imposed at the discretion of the confessor.⁴

In the year 1135 a Contract of Brotherhood was made between the Canons of Notre Dame and the Canons of Premontre of St. Michael's Abbey in Antwerp, in which there was an agreement that the members of the Notre Dame par-

⁴Le Paige, *o. c.*, 312; it is doubtful however whether these Rules can be said to have originated at the time of Norbert; this is especially the case regarding the reception of the Sacraments. The monks themselves received communion only about seven times yearly, and for those who lived in outlying districts, the number was even less. Le Paige, *l. c.*, although attempting to prove the existence of these Rules at the time of Norbert, nevertheless in speaking of the members of the society using these Rules, says 'olim obligantur', as though the exact time at the most were indeterminate. The movement of the laity toward affiliation with the Order of Premontre at the time of Norbert is not denied, but in view of these difficulties, it is doubtful whether this movement could be resolved into what is now known as a Third Order. It would therefore seem that these Rules, especially those regarding the frequent reception of the Sacraments, had their origin at a later date when this frequent reception of the Sacraments (it was considered such in the twelfth century) was more in accord with the custom and trend of the times. Cf. Van Den Borne, *o. c.*, p. 49-53.

ish who desire aggregation with the Premonstratensians may, after accepting the Rule of the Order, receive the Sacraments from them and be buried by them in their Churches.*

It seems that about the middle of the sixteenth century the custom of wearing the white scapular was somewhat modified, and that instead of this scapular, the members wore a medal of lead having on one side the figure of a host in a monstrance; this medal was suspended from the neck.* At the close of the seventeenth century, the 'Confraternity of the White Scapular' established in the Abbey of Beauport in Catholic Brittany received papal approbation.*

On May 22, 1751, Benedict XIV approved a Rule for the Third Order Secular of St. Norbert and granted many privileges to its members;* a new list of Indulgences was approved March 4, 1904.*

*The Bollandists (*ASs*, June, I, p 920-923) demonstrate that this had evident reference to what is now known as the Third Order Secular of St. Norbert.

**Ibidem*.

*Hugo, *Annales O. Praem.*, I, 314.

*Auvrey, *Manuel du Tiers Ordre de Premontré*, p 32; Tachy, *Les Tiers Ordres*; p 15; Heimbucher, l. c. gives 1752 as the date of approval; the complete Rule is given in Auvrey, *o. c.*, and in Geudens, *Manual of the Third Order of St. Norbert*.

*S. C. of Indulg. (*A. S. S.*, XXXVI, 634-637).

CHAPTER III

THE HUMILIATES

The development of the religious life in both clergy and laity received a new impetus in the twelfth century at the hands of the Humiliates. Their origin has commonly been connected with a group of Lombardian nobles whom the Emperor Henry II exiled to Germany in the year 1017. These noblemen were supposed to have been returned to their native land by command of the Emperor, on condition that they would form a sort of religious brotherhood, and cause no more political troubles.¹ The chronicle continues that these companies of both men and women persisted for more than a century without any recognized Rule, 'and they were called brethren of the Third Order'. Later St. Bernard (1134) is said to have given them permission to separate from their wives, and also to have given them a Rule.²

Zanoni rejects this old opinion and proves conclusively that the Humiliates do not go back farther than the second

¹This chronicle is given in Tiraboschi, *Vetera Humiliatorum Monumenta*, III whose work is not accessible; the excerpt is taken from Davison, *Some forerunners of St. Francis of Assisi*, p 57; Brück, *Lehrbuch der Kirchengeschichte*, p 492, evidently bases the part of the Emperor Henry II on the same evidence.

²Davison, *l. c.*, Hergenrother-Hanlen, *Welzer und Welte's Kirchenlexikon*, VI, p 419 f; cf. also Hergenrother, *Theologische Bibliothek*, II, p 638.

half of the twelfth century.*

The part often attributed to St. John of Mede in the foundation of this organization⁴ is also proved to be without foundation.

The impulses which produced this society seem to have been the fervent religious preaching and agitation especially among the lower classes; they fasted severely, did manual labor, and established communities of men and women engaged principally in the weaving of wool.⁵ The anonymous Chronist of Laon speaks of certain citizens of Lombardy (1178) who lived a religious life in their homes, abstained from oaths and lawsuits, and took the name 'Humiliates' because of their poor clothing. Having requested the Pope to sanction their tenets, they were told that they might continue their mode of life provided they did this in humility and abstained from holding conventicles and preaching; they however defied the Apostolic command and incurred excommunication.⁶

Toward the end of the twelfth century the name 'Humiliate' had a heretical meaning among the people.⁷

The Chronist Buchard of Augsburg speaks of them being heretical *from the very beginning*.⁸ The most plausible explanation, however, is that due to the letter of Innocent III to the bishop of Verona (1197)⁹, an investigation was made

*Synopsis of Zanoni's arguments in Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens (Franziskanische Studien, Beiheft VIII)*, p 65 f, and in *A. F. H.*, VI [1913], p 172-175.

⁴Cf. Holweck, *A Biographical Dictionary of the Saints*, p 545; *ASs.*, Sept., VII, p 320-336.

⁵*A. F. H.*, VI [1913], p 173.

⁶*M. G. H. Ss.*, XXVI, p 449 f.

⁷Already in 1184 the name is mentioned in connection with an excommunication of those 'qui se Humiliatos vel Pauperes de Lugduno falso nomine mentiuntur.' (Mansi, *Collectio Concilii*, XXII, p 477).

⁸*M. G. H. Ss.*, XXIII, p 377.

⁹Migne, *P. L.*, CCXIV, 788 f.

which distinguished the true from the false, the former being reconciled to the Church and given a Rule by Innocent III June 7, 1201.²² In the Bull of confirmation Innocent III reminded them of their former heretical tendencies; he approved three branches: the first, second, and third Orders. The latter was composed of men and women who lived at home with their families. According to Pierron, the Rule for the Third Order contained the following points: ²³

The greatest importance is laid upon the practice of humility, penance, obedience toward the prelates of the Church, patience and the suffering of injuries, prayer and the practice of mutual Christian charity.

Obligations: Whatever remained of the income resulting from their manual labor was to be distributed among the poor; tithes were paid to the clergy.

Wednesdays and Fridays were days of fasting with the following exceptions: Pentecost, the time from Christmas to Epiphany, and the Holy Days of the Church.

The time of the canonical hours was observed by the recitation of Seven *Our Fathers*, in addition to the recitation of the *Apostles' Creed* at Compline and Prime.

They were especially admonished to dress plainly, to fulfill their conjugal obligations faithfully, and to assist one another in time of sickness.

All were obliged to attend the funerals of deceased brethren, and recite prescribed prayers for the repose of their souls.

They were to live at peace with their fellow men, and to

²²A. F. H., VI [1913], p 173; Davison, *Some Forerunners of St. Francis of Assisi*, p 59 f; Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens* (*Franziskanische Studien*, Beiheft VIII) p 66; Buchberger, *Kirchliches Handlexikon*, I, p 2046, is of the opinion that the Humiliates lapsed into the heresy of the Waldenses and were excommunicated toward the end of the twelfth century.

²³Van Den Borne, *o. c.*, p 67 f.

repair all injury to their brethren. Daily prayers were required for the deceased, and for peace in the Church and among all Christian peoples. Prayer was required at all meals, as well as moderation in eating and drinking.

Permission was given to assemble every Sunday in a fitting place, where one of the brethren versed in religion was to give an instruction after having obtained the permission of the diocesan bishop. They were forbidden to preach about faith or the Sacraments.¹³

A comparison of these Rules with those of the primitive Franciscan Tertiaries shows a striking resemblance, and in many instances an identical application. Especially is this noticeable regarding the obligation of fealty to the Church, the restoration of ill-gotten goods, prayers for the dead, attendance at funerals, and the alleviation of the sufferings of the sick and the poor. Their refusal to take an oath had the same effect as in the Franciscan Third Order: the breaking down of the feudal system, and the consequent collision of the Humiliates with the civil authorities, with whom Innocent III remonstrated in their behalf.¹⁴

This short sketch is sufficient to indicate the great influence which the Rule of the Humiliates exercised upon the regulations drawn up for the Franciscan Tertiaries by St. Francis and Cardinal Ugolino.¹⁵

The Humiliates gradually broke up in the beginning of the sixteenth century, so that the Order is now no longer in existence.¹⁶

¹³This seems to be a warning not to relapse into their former heretical sermons.

¹⁴Cuthbert, *Life of St. Francis of Assisi*, p 336; Felder, *The Ideals of St. Francis of Assisi*, p 292 f.

¹⁵Cf. the first Rule of the Third Order of St. Francis in the appendix to this treatise; *A. F. H.*, VI [1913], p 174.

¹⁶*Ibidem*; Davison, *Some Forerunners of St. Francis of Assisi*, p 68 f.

CHAPTER IV

THE DOMINICAN THIRD ORDER SECULAR

There is a variance of opinion regarding the exact foundation of the Third Order Secular of St. Dominic. According to the *Annales* of the Dominican Order, this institution at its inception had both a religious and military aspect; the male members were to combat the heresies condemned by the Church and, if necessary, to defend the possessions of the Church with physical force, while their wives and relatives were to live lives of piety and prayer.¹

A second opinion would have it that it was originally an order of penance similar to the Franciscan Third Order Secular; this was under the care of the Friars Preachers whose influence over them became more pronounced as time progressed; later a society previously organized for combating heresies (known as the Militia of Jesus Christ) lost its military aspect and became a part of the Third Order.²

The opinion of Blessed Raymond of Capua seems to possess the greatest probability. According to him the Third Order of St. Dominic arose from the Militia of Jesus Christ.³ The men were required under oath to fulfill this office; their wives and relatives were also obliged under oath not to hinder the men in the fulfillment of this duty; Dominic him-

¹*Annales O. Praed.*, I, p 232 f.

²Jarret, "The Third Order of St. Dominic", *Catholic Encyclopedia*, XIV, p 638.

³The commission to organize this association seems to have been given to St. Dominic by the bishop of Tolouse-Heimbucher, *o. c.*, II, p 169.

self called these the Militia of Jesus Christ. When these military duties were no longer necessary, the Holy See changed their name to 'Fratres de Poenitentia S. Dominici'.⁴

December 22, 1227, Gregory IX approved and confirmed their object of defending the faith.⁵

The opinion of Blessed Raymond of Capua is implicitly denied by Malvenda when he places the Bull, *Detestanda humani generis*, of Gregory IX (1227 or 1228) in the Dominican Bullarium⁷; he thus claims that this Bull has reference to the Dominican Tertiaries. But this seems to be false, for historians (Raymond of Capua, S. Antoninus, and an anonymous Dominican historian) agree that the name *Fratres de Poenitentia* was not applied to the Dominican lay society until after the death of Dominic, which occurred in 1234. How, then, can this Bull of 1227 which is given in favor of the *Fratres de Poenitentia*, have reference to those of the Dominicans at a time when they were not known by such a name? It follows, therefore, that this Bull has evident reference to the 'Fratres de Poenitentia S. Francisci'.⁸ Sbaralea also demonstrates that this Bull was placed in the Bullarium of the Dominican Order by mistake.⁹

However the Constitution *Ut cum majori* of November 21, 1234, seems to have reference to the *Fratres de Poenitentia*

⁴ASs., Aug., I, p 419; in effect the same opinion is held by: Tachy, *Les Tiers Ordres*, p 13; Heimbucher, *o. c.*, p 169 f; Hergenrother, *Theologische Bibliothek*, II, p 629 f; Currier, *History of Religious Orders*, p 280; Chelodi, *Jus de Personis*, n. 302; Vermeersch-Creusen, *Epitome*, n. 788; Prümmer, *Manuale Juris Canonici*, Q. 270; Drane, *The History of St. Dominic*, p 243-245; cf. also [], *The English Dominican Province*, p 303 f; for the Rule of the Militia, cf. Frederici, *Historia de Cavalieri Gaudenti*, II, p 12 f.

⁵Bull, *Egrediens Hereticorum* (Bull. O. Praed., I, n. 19, p 25).

⁷Bull. O. Praed., I, n. 25, p 27 f.

⁸ASs., Aug., I, p 420 f; cf. Drane, *The History of St. Dominic*, p 245.

⁹Bull. Franc., I, n. 20, p 40.

S. Dominici as well as those of the Franciscans, for at this time both Franciscan and Dominican Tertiaries were known as 'Poenitents'.¹¹

In the beginning the Dominican Tertiaries had no definite Rules, so that in 1285 the Minister-General of the Friars Preachers, Munon di Zamora, drew up definite Regulations,¹² which were approved by Innocent VII in 1405 and by Eugene IV in 1439.¹³

¹¹Cf. *ASs.*, 1. c.; *Annales O. Praed.*, I, p 236 f.

¹²Mortier, *Histoire des Maîtres Généraux de L'Ordre des Frères Prêcheurs*, II, p 221 f.

¹³Buchberger, *Kirchliches Handlexikon*, II, p 2326; for a list of recent indulgences and privileges granted to the Order cf. *A. S. S.*, XXXIX, 553-558.

CHAPTER V

THE THIRD ORDER SECULAR OF ST. FRANCIS

ARTICLE I

Foundation and First Rule

The preceding chapters have attempted to give an idea of the tendency on the part of the laity to connect themselves in some manner with the religious life, while still living in the world. It is but natural that this should have exercised great influence on the origin and development of the Franciscan Third Order.¹

In the time of St. Francis the tendency of the people in this regard is first brought to light by the great influence he and his disciples exercised by their preaching; many were thus attracted by the man of God.²

That this preaching bore great fruit is attested by the 'Legend of the Three Companions', which relates that the people led a more mortified life in their homes.³

¹This is admitted by historians and canonists: cf. above chapter I.

²"* * * veritatem fidentissime loquebantur, ita ut etiam litteratissimi viri, gloria et dignitate pollentes, ejus mirarentur sermones et timore utili ejus presentia terrentur. Currebant viri, currebant et feminae, festinabant cleri (ci), accelerabant religiosi, ut viderent et audirent sanctum Dei, qui homo alterius saeculi videbatur. Omnis aetas, omnisque sexus properabat cernere mirabilia, quae noviter Dominus per servum suum operabatur in mundo * * *"—*Legenda Prima*, XV (*S. Francisci Vita et Miracula*, ed. Alenconiensis, p 38 f).

³ASs., October, II, p 737.

The first definite thought and purpose in the mind of Francis to connect all classes of people in some manner with the First Order seems to be contained in his letter 'to all Christians, religious, clerics and laity, men and women, to all who dwell in the whole world,' in which he exhorts them to lead a more christian life, as he sets forth in the letter. "In practice it [the letter] would be interpreted by those living in the world to demand a closer or more distant approximation to the observance of the brethren themselves. . . . But the letter was to them in very fact, a rule of life to which they sought to conform their conduct. . . . They did not at first nor for some years constitute a separate organization from the brethren themselves: in the larger sense they were considered members of the fraternity, even as Clare and her sisters were."*

According to Thomas of Celano, the first definite idea of a Third Order arose in the mind of Francis when he performed a miracle while preaching at Alviano.⁶ On account of this miracle and the great eloquence of Francis, the multitude wished to become his disciples. Realizing this to be incompatible with their state of life in the world, the Saint nevertheless promised that he would provide for them; whereupon he considered establishing a Third Order 'qui

*The letter may be found in, Robinson, *The writings of St. Francis*, p 98-108 (he places the date of the letter at 1215-p 96); [], *Works of St. Francis of Assisi*, p 1-9; Boehmer, *Analekten zur Geschichte des Franziskus von Assisi*, p 49-57; Little, *Francis of Assisi*, p 164 also prefers the date as 1215; Wadding, *Annales Minorum*, ad an. 1213, places the date of the letter to this year.

⁶Cuthbert, *Life of St. Francis*, p 331.

⁷Legenda Prima, XXI, 59 (*S. Francisci Vita et Miracula*, ed. Alenconiensis, p 62); in *Actus B. Francisci*, by Sabatier, p 57, this incident is laid in Cannara; Wadding, *o. c.* ad an. 1212, n. 32, gives the name of the town as Alviano; in *Fioretti*, cap. 16, the name is mentioned as Savurniano.

dicitur continentium'.

The influence caused by the letter and the latter incident, coupled with the agitation already in the minds of the faithful caused by the religious forerunners of St. Francis, seem to have been the direct impelling motive for the establishment of a Third Order Secular by the Saint.

The opinion that the Third Order separated from the First and was thus developed ' has been severely criticized.'

The real foundation of the Third Order seems to have occurred during the year 1221 " at Fienza and the surrounding

'Jorgensen, *St. Francis of Assisi*, p 240 f.

'Mandonnet, *Les Origines de L'Ordo de Poenitentia (Compte Rendu du IV Congres Scientifique International des Catholiques)*, p 183-215.

'Little, *A Guide to Franciscan Studies*, p 60; *A. F. H.*, XIII [1920], p 76." * * * "S. Franciscus tres ordines instituit, tribuens unicuique normam vitae"; Bernard of Besse, "Liber de Laudibus", *Analecta Franciscana*, III, p 679-"Doctrinae Francisci elucet maxime fructus in tribus ab eo statutis ordinibus"; "I cannot accept unreservedly the conclusions of M. Sabatier and P. Mandonnet O. P. that in the beginning of the Franciscan fraternity these informal disciples [those who lived in the world according to the Franciscan spirit, being fired by the influence of Francis] who afterward became the nucleus of the Third Order, were considered members of the fraternity in the same sense as the friars and the sisters of San Damiano * * * There is no evidence that people professing this Rule separated, one group forming the First Order and another the Third". (Cuthbert, *o. c.*, p 323; Bihl (*A. F. H.*, VI [1913], p 175 in speaking of the historian Zanoni, makes the following remark: "Ipse Z. [Zanoni] Male sequitur hypotheses P. Mandonnet * * *"; cf. Wyngaert, "Examen des Theories du R. P. Mandonnet sur L'Ordo de Poenitentia", *Neerlandia Franciscana*, VI; Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens*, *o. c.*, p 92.

"*Bull. Franc.*, I, n. 8; in speaking of the Bull, *Significatum est nobis*, which was given to the Penitents [Tertiaries] at this time by Honorius III, Sbaralea, the author of the *Bullarium Franciscanum*, makes the following comment: "Nimirum fratres tertii ordinis dicti de poenitentia hoc anno mense Junio a S. P. Francisco institutum primum apud Canaria oppidum prope Assisium, exinde apud alia loca et civitates ut perhibet laudibilis Waddingus"; Wadding, *Annales Minorum*, ad an. 1221, n. 12 mentions the same town; Marianus,

country.²¹ Cardinal Hugolino and St. Francis collaborated in drawing up the Rule.²² There is also the express testimony of Bernard of Besse that Francis founded a Third Order.²³ The reason that this institution is called a *Third Order* is because of its chronological foundation after the *First Order* (Regulars) and *Second Order* (Poor Clares) respectively.

However all indications point to the fact that even before the explicit establishment of the Rule by the Saint and Cardinal Hugolino, many of the faithful had already received special norms of life from the hands of Francis;²⁴ the

"Compendium Chronicorum FF. Minorum", *A. F. H.*, II [1909], p 96, mentions the year as being 1220—"Anno Domini 1220 beatus Franciscus applicuit Venetias et Bononiam, ubi ab omnibus honorifice receptus fuit cum gaudium et omnium applausu, et praecipue a Domino Hugolino, legato Sanctae Romanae Ecclesiae, cum Florentiam veniens, et reperiens devotionem maximam populi ad poenitentiam animati, composuit regulam pro viris et mulieribus a matrimonio ligatis". However, the date which Marianus gives seems to be false, for Hugolino was not in Florence at that time (1220)—cf. *A. F. H.*, II [1909], p 96, n. 10; Vermeersch, *Periodica*, (163).

²¹Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens*, o. c., p 127 mentions this town as possessing the greatest probability; cf, also Müller, *Die Anfänge des Minoritenordens*, p 133 f.

²²Wyngaert, "De Tertio Ordine S. Francisci", *A. F. H.*, XIII [1920], after a critical examination, draws the following conclusion: "Card. Hugolinus anno 1221, legatione fungens et inveniens quosdam fratres de poenitentia composuit regulam". Benedict XV, const., *Sacra Propediem*, Jan. 6, 1921 (*A. A. S.*, XIII [1921], 35) also states that Cardinal Hugolino assisted Francis in drawing up the Rules.

²³"Liber de Laudibus", *Analecta Franciscana*, III, p 679—"Doctrinae Francisci elucet maxime fructus in tribus ab eo statutis ordinibus". p 686—"Tertius est Ordo fratrum et sororum de poenitentia, clericis, laicis, virginibus et conjugatis communis, cujus propositum est in domibus proprii honeste vivere * * *".

²⁴Jorgensen, *St. Francis of Assisi*, p. 242; Van Den Wyngaert, "De Sanctis et Beatis Tertii Ordinis", *A. F. H.*, XIV [1921], p. 3: "Nam priusquam regula quae nobis ut antiquior nota est, pro penitentibus redacta est et eis a Cardinali Hugolino imposita fuit, S. Franciscus

letter which he wrote to all the faithful may be cited as a good example of these indications.

According to Wadding,²² the first reception into the Third Order took place at Gagniani, not far from 'Podii Bonantis, alias Bonitii', when Francis garbed Luchesius with the first habit of the penitential Order. The first Rule written by the Saint and Cardinal Hugolino was discovered by Sabatier about twenty years ago in the Franciscan Monastery of Capistrano in the Abruzzi;²³ he edited it in his *Regula Antiqua Fratrum et Sororum de Poenitentia*.²⁴

The first five chapters and the first three numbers of the sixth chapter date from the year 1221; the remaining six chapters show some retouching from 1221 to 1228 or 1229. The last (thirteenth) seems to have been gradually added up to the year 1247. Despite these additions the Rule retains the same tenor throughout.²⁵

The arrangement of the matter in the Rule is also rather faulty; thus the fourth chapter is separated from the fifth although both treat of prayer, while other chapters, e. g.

quamdam normam vitae cuius indolem ignoramus, eisdem tribuerat". Cf. Cuthbert, *Life of St. Francis*, p. 323 f; Van Den Borne, *Die Anfänge des Franziskanischen Dritten Ordens*, o. c., p. 124 f.

²² Wadding, *Annales Minorum*, ad an. 1221, n. 13; cf. also *ASs.*, April, III, pp. 605 f; *Officia Propria O. F. M. Conv.*, p. 141; Vermeersch, *Periodica*, XIII, (163).

²³ Callaey, *The Third Order of St. Francis*, p. 13.

²⁴ *Opuscles de Critique Historique*, I, pp. 16-30; another version of the Rule was edited by Lemmens, "Regula Antiqua Ordinis de Poenitentia (1221) juxta Novum Codicem", *A. F. H.*, VI [1913], p. 242-250; Oliger edited a Rule of 1289 part of which goes to the original Rule of 1221: "Expositio Brevis Regulae Antiquae III Ordinis S. Francisci", *A. F. H.*, XIV [1921], p. 122-129; the original Rule discovered by Sabatier is often called the *Capistran Rule* on account of the place where it was found.

²⁵ To substantiate these assertions the reader is referred to the *Regula Antiqua* as edited by Sabatier; it is reprinted in extenso in the appendix below pp. 177-185; the disposition and the repetition of the identical

VIII, X and XIII, contain more matter than is indicated in their title.

The Rule contains the following points:

The first chapter demands that the Tertiaries be garbed in simple dress, and that they do not take part in, or contribute toward frivolous amusements; the visitor is empowered to interpret the Rule regarding dress.

Only two meals should be eaten a day except by the sick; they should abstain from meat on all days excepting Sunday, Tuesday, Thursday and certain feasts; again they are excused on account of sickness and traveling; besides observing the ordinary ecclesiastical fasts, they are to fast on Wednesdays and Fridays from the feast of All Saints to Easter; a continual fast is to be observed from the feast of St. Martin to Christmas, and from Quinquagesima Sunday till Easter, unless legitimately dispensed on account of sickness or other necessity (II-III).

Clerics shall recite the canonical hours of the Church; the laity, psalms and other prescribed prayers in their stead; the sick are excused from this recitation. Unless legitimately prevented, all should attend matins during the Lent of St. Martin and also during the Great Lent. Confession and Communion is prescribed three times yearly (IV-VI, 1).

Past debts must be satisfied; the brethren should always speak with decorum and abstain from taking oaths except in those contingencies which are allowed by the Roman

matter with slight changes clearly indicate gradual additions and changes; for complete arguments cf. Mandonnet, *Les Règles et Le Gouvernement de L'Ordo de Poenitentia au XIII Siècle (Opusculs de Critique Historique*, I, p. 143-250); Wyngaert, "De Tertio Ordine S. Francisci", *A. F. H.*, XIII [1920], p. 3-67; Bughetti, "Prima Regula Tertii Ordinis", *A. F. H.*, XIV [1921], p. 109-121; proof of these changes and additions will be given from time to time throughout this dissertation.

Pontiff. Deadly weapons cannot be carried (the remainder of VI).

All are required to attend Mass in a body monthly, where a religious discourse shall be given by a religious; at this service dues must be paid to the treasurer for assisting the sick and the poor, as well as for funeral expenses. The poor and the sick shall be visited weekly by the ministers or their delegate, who are to render them assistance from the common fund. Tertiaries are to attend the funerals of the brethren and recite prayers for them within the octave of their death. Clerics shall say three Masses yearly for the dead; the laity shall recite prayers (VII-IX).

Those who have not satisfied all their obligations and made peace with their enemies cannot become members; heretics are also excluded. After a year's probation a novice is received into the Order by promising to obey the Rules of the organization, whereupon his name is written in the register. Within three months of profession, members are to draw up their will. Those who are incorrigible are to be expelled from the society by the visitor, after having obtained the advice of the more prudent brethren (X, 1, 5-10; XI; XII, 1-2).

Authority in the Third Order:

(a) The diocesan bishop is to intervene in the event of conflict between the rights of the Tertiaries and civil authority (X, 2-3). Those suspected of heresy must be cleared of this charge by him before entering the Order. Hence his permission was not ordinarily required for reception.

(b) The visitor possesses great authority in the Order: the quality of clothing and ornaments is subject to his judgment (I, 6); transgressors of the Rule must repair any scandal according to his discretion (X, 9); transgressions of the Rule must be reported to him (XII, 1), and it is he who,

after having been informed of the obstinacy of an incorrigible Tertiary by the ministers, pronounces expulsion after a consultation with the more prudent brethren (XII, 2). Scandals must also be reported to him (XII, 4). The visitor may dispense from every point of the Rule in cases where he deems fit (XII, 5).

(c) The ministers seem to be considered as the local superiors of the society. They are elected yearly by the retiring ministers and their counselors (XII, 6); no one should refuse to accept an office for which he has been designated. The ministers receive applicants into the novitiate after due investigation; it is their duty to instruct novices in the Rule (X, 5), and they may also receive into the Order upon the advice of judicious Tertiaries; they may dispense from the ordinary mode of reception (X, 7-11). They are to keep vigil concerning discordances among the brethren (X, 2). Monthly meetings should be called by them at which, according to their discretion, money should be collected for the sick and poor (VII, 1-2), who are to be cared for through the ministers (VIII, 1).

(d) A minor official known as the treasurer is the administrator of the funds and distributes the alms collected at the monthly meetings (VII, 2; XII, 6).

Chapter thirteen was added at a considerably later date as the contents indicate: e. g. VI, 1 prescribes confession and communion three times yearly, while XIII, 5 states that the Tertiaries shall confess monthly; again XIII, 6 is a repetition of VII, 1, with slight changes. The addition of XIII, 2; 4-5 will be treated in the next article. Other insertions in the Rule which came about through papal decrees will also be treated as the occasion demands.

ARTICLE II

THE GOVERNMENT OF THE THIRD ORDER
SECULAR OF ST FRANCIS

Relations with the Friars Minor

I PERIOD: From its Foundation till the Time
of Pope Benedict XIII

The summary of the primitive Rules given in the previous article clearly indicate that the entire government of the Third Order rested *ipso jure* with the Tertiaries themselves, from whom their officials were chosen. The ordinary of the place is accorded no authority beyond that of interceding in their behalf with the secular powers in case of conflict (X, 2-3) and in deciding the suspicion of heresy in reference to postulants (X, 1). In stating that the entire government was vested in the Tertiaries, it is not intended to imply that the Friars Minor had nothing to do with the direction of the Third Order. The very fact that St. Francis had founded the society would logically postulate some connection with the First Order. But to assert on the other hand, that the Friars Minor had rights (*jura*) founded in law toward the Tertiaries is going beyond the contents of the Rule as well as papal documents now available.

Fr. Callaey is of the belief that at the monthly meetings, the preacher mentioned in the Rule as 'unum religiosum'¹ may have been a Friar Minor: "The expression 'Unum religiosum' seems to have had a very broad meaning and to imply that the Tertiaries were free to choose their preachers from among the secular clergy or even a layman; but it is equally probable that the expression indicates no one else but a Friar Minor".²

¹ VII, 3.² Callaey, *The Third Order of St. Francis*, p. 95, n. 13.

Regarding the power of the visitor and the ministers, this seems to have changed at times. Sabatier describes the authority of the visitor of the thirteenth century in the following sense: "Dans la langue du XIII^e siècle, le mot de *visitor* désigne d'ordinaire des inspecteurs chargés avant tout d'assurer le fonctionnement régulier de la discipline, ce sont les dignitaires de la police ecclésiastique".³ Sometimes the visitor appears as a mere corrector;⁴ at other times as having real legislative power which is over that of the ministers;⁵ then again the authority of the ministers and the visitor seems to be equal.⁶

Visitation by the bishop was not introduced until the year 1234, when this authority was given to him by Gregory IX: "*Per apostolica vobis scripta mandamus, quatenus ad visitationem et correctionem eorum quilibet in sua diocesi sollicito intendentes, et habentes ipsos ob reverentiam Sedis Apostolicæ et Nostram propensius commendatos, nec molestis, nec permittas eosdem, quantum in vobis fuerit, molestari indebite*".⁷ From this it is to be inferred that these molestations to which the pontiff refers were to be stopped by the visitation and intercession of the bishops, and that they did not cease before because the bishops had performed this office up to this time; the Rule (i. e., up to chapter thirteen, which was added at a considerable later date) did not require a priest as visitor;⁸ hence it seems that up to the year 1234—when the ordinary of the place assumed this office—it was filled neither by a secular priest nor by a Friar Minor, but by a layman.

³ *Opuscles de Critique Historique*, I, p. 19; the italics belong to the original author.

⁴ I, 6; X, 9; XII, 1, 2, 4, 7.

⁵ XII, 2.

⁶ XIII, 1, 4, 6, 9, 14, 15.

⁷ Bull. *Ut cum majori*, Nov. 21, 1234 (*Bull. Franc.*, I, n. 149, p. 142 f.).

Although the Original Rule did not give the Friars Minor any part in the government of the Third Order, it seems that they took some part in the spiritual direction of the local fraternities, according to the testimony of Bernard of Besse: "*Tertius est Ordo fratrum et sororum de poenitentia . . . Istis a principio frater assignabatur minister*";⁷ but even this contact which the Friars Minor maintained with the local organizations in the beginning gradually vanished, according to the same testimony, which continues: "*sed nunc suis in terra dimmittuntur Ministris, ut tamen a fratribus tamquam confratres et eodem patre geniti consiliis et auxiliis foveantur*".⁸

Beginning with chapter seven, ministers are mentioned, who again did not require any sacerdotal character. Using the testimony of Bernard of Besse, it seems that in the beginning the Friars Minor exercised this office, and that chapter seven was inserted in the Rule at a time when, according to Bernard of Besse, the direct contact with the local fraternities was no longer kept up by the latter; this change of the office of minister from the Friars Minor to two members of the Third Order occurred about 1227, according to Wyngaert,⁹ and was inserted in the Rule at that time. There are no documents from which the duties of the minister mentioned by Bernard of Besse can be deduced. Despite the fact that this office seems to have been exercised by the Friars Minor, nowhere is there any proof that the Tertiaries were *subject* to them, nor that they had any rights

⁷* A priest is not mentioned as fulfilling this office, nor do his duties require a sacerdotal character; cf. Mandonnet, *Les Regles et le Gouvernement de L'Ordo de Poenitentia au XIII Siècle (Opuscules de Critique Historique, I)* p. 183 f; Sabatier, *Regula Antiqua Fratrum et Sororum de Poenitentia (Ibidem)*, p. 12.

⁸ "Liber de Laudibus", *Analecta Franciscana*, III, p. 686.

⁹ *Ibidem*.

¹⁰ *A. F. H.*, XIII [1920], p. 72.

(*jura*) toward the Third Order *which they could assert*, such as they received through later papal decrees.

Chapter thirteen, beginning with the fourth number up to the tenth, was inserted about 1247 when Innocent IV conceded the first papal jurisdiction to the Friars Minor over the Tertiaries of Italy. For the purposes of comparison, the dispositive part of the Bull, and the Rule itself, will be quoted: "*Nos eorum precibus annuentes discretioni vestrae praesertim auctoritate mandamus, quatenus ipsis opportunis temporibus, per vos, et Fratres vestri Ordinis ad hoc idoneos visitationis officium independentes, et instruentes regularibus disciplinis, corrigatis, reformatis eosdem, tam in capite, quam in membris, quae correctionis, et visitationis officio noveritis indigere*".¹¹ Here the Friars Minor are clearly given the right of spiritual direction over the Third Order in Italy. Note is also to be taken of the word '*instruentes*', from which it may also be concluded that they took over the office of instructor, which is mentioned in the original Rule as '*unum religiosum*'.¹² In the Rule¹³ there is the following: "*. . . petant a ministro vel custode fratrum Minorum unum fratrem Minorem de conventu, cujus fratris consilio et voluntate fratrum ista fraternitas gubernetur in omnibus et regatur. Et quando ille frater [Minor] recederet de conventu, petant alium loco ejus, ita quod semper consilio fratrum Minorum regatur ista fraternitas quae a beato Francisco habuit fundamentum*". The similarity between the words of the Bull and the Rule indicates that the latter was formulated and placed in the regulations on account of the former. Another argument can be deduced from the words '*de conventu*': this term was not in use before the middle of the

¹¹ Bull. *Vota devotorum*, June 13, 1247 (*Bull. Franc.*, I, n. 210, p. 464).

¹² VII, 3.

¹³ XIII, 4-5.

thirteenth century," therefore neither was it placed in the Rule before that time.

The Bull quoted was given in favor of the Friars Minor after the Tertiaries of Southern and Central Italy had petitioned Innocent IV to allow the Friars Minor to perform the office of visitation instead of the bishops; they feared that the bishops and pastors of Italy, many of whom had complained in a letter to the Emperor Frederic II that the two 'mendicant orders had lessened their [the bishops' and pastors'] popularity by establishing two new brotherhoods, and enrolling so many men and women that hardly one person can be found who is not a member.'

Despite the fact that this jurisdiction over the Tertiaries was thus taken away from the bishops and given to the Friars Minor, Innocent IV allowed the bishops of Lombardy who were antagonistic to the cause of Frederic II to retain authority over the Tertiaries, especially regarding visitation.¹⁴ The same pontiff excommunicated Frederic and decreed that all who would adhere to him would incur the same censure.¹⁵ Many who later repented of their adherence to the Emperor turned toward the Franciscan Third Order as a refuge, whereupon Innocent granted faculties to the Friars Minor Provincials to absolve them for the purpose of entering the Order.¹⁶

¹⁴ Holzapfel, *Manuale Historiae O. F. M.*, p. 71 f; cf. Wyngaert, "De Tertio Ordine S. Francisci", *A. F. H.*, XIII [1920], p. 73, note 3.

¹⁵ Callaey, *The Third Order of St. Francis*, p. 33; the two brotherhoods referred to are of course the Third Orders Secular of St. Francis and Dominic; this letter has commonly been attributed to Peter de Vineia, a counselor of Frederic II; the authorship, however, is as given above—cf. Callaey, *o. c.*, p. 88-94; p. 97, note 9.

¹⁶ Nov. 10, 1248 (*Bull. Franc. Epitome*, n. 518).

¹⁷ Parsons, *Studies in Church History*, II, p. 375 f.

¹⁸ "Cupientes animarum periculis obviare, absolvendi eos, qui Fratres de Poenitentia in Italia, et Regno Siciliae Ordinem intraverint, ab excommunicationis sententia, si quam fovendo F. R. quondam Imperatori,

At the same time this favor is evidence of the esteem in which the Third Order was held as a means of combating those who were false to their promises of adherence to the Church. There is no doubt that the large numbers of the laity who thus forsook their allegiance to Frederic greatly weakened his power.

Some say that between the years 1257-1274 (the Generalate of St. Bonaventure) the Friars Minor had very little to do with the Third Order Secular; as a proof they put forth the question which was said to have been included in a letter written to the Saint: "*Why do the Friars Minor not favor the Order of Penance*?" However, it is doubtful whether this letter," which also contains the answer of the Saint, is authentic." On the other hand there is evidence that the relations between the Friars Minor and the Tertiaries gradually became lessened, for in 1264 the Tertiaries of San Geminiano were permitted to receive the sacraments in times of interdict in the parish church, but *not* in the Church of the Friars Minor.²⁴ There are, however, individual instances of friendly relations between the two Orders.²⁵

In 1289 Nicholas IV solemnly approved the Third Order

et fautoribus ejus, postquam excommunicatus extitit, incurrerunt; dummodo super eum quod foverunt, vel adhaererunt, de stando mandatis Ecclesiae, et de non favendo, ac adhaerendo eo de caetero praestent cautionem juratoriam, et aliam etiam congruentem; auctoritate vobis praesentium concedimus facultatem".—Bull, *Cupientes animarum*, Sept. 24, 1247 (*Bull. Franc.*, I, n. 241, p. 492 f).

²⁴ Cf. *A. F. H.*, II [1909], p. 67, n. 2; *S. Bonaventurae Opera Omnia*, VIII, p. 368 f.

²⁵ Cf. Wyngaert, "De Tertio Ordine S. Francisci", *A. F. H.*, XIII [1920], p. 74, n. 5.

²⁶ Urban IV, July 5, 1264 (*Bull. Franc. Epitome*, n. 1200).

²⁷ Cf. *o. c.*, n. 1304; *Bull. Franc.*, III, n. 161, p. 153; *A. F. H.*, I [1908], p. 549, X, where the Statutes of the Tertiaries of Brescia mention that a Friar Minor should be summoned in case of discordance among the brethren.

and issued a new Rule. The part relating to the Friars Minor bears out the assertion that their relations with the Tertiaries had gradually become weaker, for the pontiff only *advises* that the reformers and visitors should be taken from the Friars Minor, who are to be designated by their guardian; lay persons are forbidden to exercise the office of visitation.²²

But even this mild measure of subjection to the Friars Minor was opposed by many of the Tertiaries who openly rebelled against it; the pontiff responded to the rebellious Tertiaries by cutting them off from all privileges, past or future, granted to Tertiaries by the Apostolic See. To those who were not opposed to this Rule, he granted permission to establish fraternities separate from the disobedient Tertiaries and to elect their own ministers.²³ The bishop of Florence, becoming vexed because the Tertiaries of that place had followed the advice of the pontiff in regard to the visitors, seized their official documents and prohibited them from administering the goods which they had collected for the benefit of the poor. Under threat of more severe measures, the bishop of Florence was commanded to restore all properties to the Tertiaries.²⁴

²² "Quia vero praesens vivendi forum institutionem a beato Francisco praelibato suscepit, *consulimus*, ut visitatores et informatores de Fratrum Minorum Ordine assumantur, quos custodes vel guardiani ejusdem Ordinis cum super hoc requisiti fuerint, duxerint assignandos. Nolumus tamen congregationem hujusmodi a laico visitari". (Chap. XVI of the Rule contained in this Bull).—Bull, *Supra montem*, Aug. 17, 1289 (*Bull. Franc.*, IV, n. 150, p. 94); however the compiler of the *Bullarium* places the date as the 18th. In the *Bull. Franc. Epitome*, p. 302, the 19th is mentioned; Wadding, *Annales Minorum*, ad an. 1221, places the date for that year—this is obviously incorrect (cf. *A. F. H.*, XIII [1920], p. 77); the *Fontes*, n. 588 refer to this constitution as having been issued on the 19th.

²³ Bull, *Unigenitus Dei Filius*, Aug. 8, 1290 (*Bull. Franc. Epitome*, n. 52, p. 305 f.).

²⁴ Bull, *Ad audiendam*, Sept. 20, 1291 (*o. c.*, n. 1968, p. 198).

Many of the Tertiaries fell into the errors of the Beguines and the Beghards concerning the state of perfection, and were excommunicated by Clement V;²⁸ but in spite of this, the same pontiff approved of the Rule of the Third Order.²⁹ John XXII also praised the Third Order and its spiritual guides, the Friars Minor.³⁰

Eugene IV reaffirmed the jurisdiction over the Tertiaries as accorded by Nicholas IV to the Friars Minor,³¹ and in several instances and places subjected the Tertiaries to the jurisdiction of the Franciscans.³² Other pontiffs did the same.³³

After the division of the First Order into the Friars Minor Conventual and Friars Minor Observant, Pope Sixtus IV gave the Minister-General of the Friars Minor (Conventual) as well as the Vicar-General of the Observants complete authority over the Tertiaries: to garb with the habit, receive into the Order, to perform the canonical visitation, to reform them both in head and members, and to appoint a priest of the First Order as confessor. This authority was to be the same as that granted by Innocent IV to the Franciscan Superiors over the Tertiaries of Italy,³⁴ with the additional privilege of receiving into the Order and appointing a con-

²⁸ Cf. Denziger-Bannwart, *Enchyridion Symbolorum*, nn. 471-478; Van Den Borne, "Analecta de Tertio Ordine", *A. F. H.*, IX [1916], p. 127 f.

²⁹ Bull, *Tenorem cujusdam*, Aug. 30, 1308 (*Orbis Seraphicus*, II, 789).

³⁰ *Orbis Seraphicus*, II, 793 f; cf. Oligier, "Documenta Inedita ad Hist. Fraticel. Spectantia", *A. F. H.*, VI [1913], p. 728.

³¹ Nov. 15, 1431 (*Orbis Seraphicus*, II, 890 f).

³² Bull, *Exposcit*, Apr. 28, 1444 (*o. c.*, B02-804); cf. Flaminio di Parma, *Memorie istoriche delle chiese e conventi dell' Osservante e Reformati Prov. di Bologna*, I, p. 428.

³³ Flaminio di Parma, *o. c.*, p. 430; Alexander VII (*Orbis Seraphicus*, II, 804 f); Pius II, Bull, *Pia Deo*, July 13, 1462 (*o. c.*, 893).

³⁴ Cf. above note 11.

fessor."²²

The most important points of this concession are: (a) the office of visitation which heretofore had pertained to the ordinary of the place (it was only a counsel or wish of Nicholas IV that the Friars Minor be the visitors, hence they had not the canonical right) was now transferred for all times to the Superiors of the Franciscan Order; (b) this seems to be the first instance where the Friars Minor are empowered by papal authority to receive into the Third Order: in fact the pontiff especially forbids the bishops and other ecclesiastics to hinder the Franciscans in this jurisdiction which he accords them.

Other decrees of the Holy See favor the jurisdiction of the Friars Minor in the same manner.²³ When some of the Tertiaries received permission to establish community life, their Superiors (Third Order Regular) in Spain, Portugal and the West Indies were given jurisdiction over the Secular Tertiaries.²⁴

At the time that the Friars Minor Capuchin received their papal approbation, they were given jurisdiction over the secular Tertiaries in the same manner as that enjoyed by the other Franciscan Families when Clement VII granted them 'all the privileges which have been accorded to the Friars Minor';²⁵ their jurisdiction and also that of the Third Order Regular was repeated by Clement X, February 16, 1676.²⁶

It was but natural that the authority of receiving into the

²² Sixtus IV, Bull, *Romani Pontificis*, Dec. 15, 1471 (*Orbis Seraphicus*, II, 893-895).

²³ Sixtus IV, Oct. 16, 1477 (*Orbis Seraphicus*, II, 895 f); Innocent VIII, Apr. 5, 1492 (*o. c.*, 896 f); Alexander VI, Aug. 26, 1492 (*o. c.*, 897 f); Julius II, Oct. 15, 1507 (*o. c.*, 898-900).

²⁴ Paul III, *Ad uberes fructus*, 1547 (Wadding, *Annales Minorum*, XVIII, 435-460).

²⁵ Bull, *Religionis zelus*, July 4, 1528, § IX (*Bull. Capuc.*, I, p. 3).

²⁶ Bull, *Sollicitudo pastoralis* (*o. c.*, p. 125 f).

Third Order was gradually taken from the Tertiaries themselves and transferred to the Friars Minor, in proportion as their control over the Tertiaries grew more pronounced. The Rule of Nicholas IV in 1289 allows Tertiary officials to receive postulants into the Order (Chap. II), but the Statutes of the Third Order Secular approved at the Friars Minor General Chapter in 1688³³ gives this authority to the Guardian (ad Cap. XVI). The right of the Friars Minor in this regard became so inviolable that in the eighteenth century the Congregation of Bishops and Regulars declared that professions made in the hands of Tertiaries were invalid, and at the same time granted a sanction in favor of past professions made in this manner.³⁴

Since Nicholas IV had transferred the obligation and privilege of visitation from the ordinaries of the places to the Friars Minor, it is evident that the bishops had little or nothing to do with the spiritual welfare of the Tertiaries as Tertiaries. Hence this pontiff implicitly reduced the authority of the ordinaries of the places to that of vigilance over the funds of Tertiary sodalities or fraternities and to the proper conduct of divine services, as was later specifically mentioned by the Council of Trent.³⁵

Toward the end of the seventeenth century this was true, not only of Tertiary Sodalties erected in the Churches of the Friars Minor, but also in those places where there were no Franciscan Religious foundations.³⁶

³³ The statutes had papal approbation; for their history cf. below chap. VIII, Art. I.

³⁴ June 18, 1717, ad III-IV (*Fontes*, n. 1834).

³⁵ Sess. XXII, *de reformat.*, cap. 8.

³⁶ The *Statuta Innocentiana*, ad cap. XVI, has the following: "Itaque in pagis poterunt fratres, et sorores sollicitare, ut aliquis sacerdos petat a p. Guardiano suam auctoritatem, in ordine ad illis assistendum, sicut assistit Visitator religiosus in Civitatibus ubi sunt Conventus. Poterunt similiter facere suas Congregationes, et electiones officiorum. Nihil

At this time, the three branches of the First Order, as well as the Third Order Regular, enjoyed jurisdiction over the Secular Tertiaries. There is nothing to indicate that the consent of the ordinary of the place was required for the valid or licit erection of Third Order Sodalties.

II PERIOD

From Pope Benedict XIII to the Promulgation of the Code of Canon Law

When Sixtus IV subjected the Secular Tertiaries to the authority of the Friars Minor, he gave authority to the Minister-General of the Conventuals, and the Vicar-General of the Observant Family. However, during the time of Leo X, conditions were reversed, not that the authority over the Tertiaries was changed in any way, but the Minister-General of the Observant Family was given the place of precedence.^a

Thus it came about in 1725 that Pope Benedict XIII—whose papal pronouncements may in truth be considered the most important and far-reaching in the history of the Third Order—in repeating the subjection of the Tertiaries to the Friars Minor, addressed this entire authority to the Minister-General of the Observant Family, *apparently ex-*

lominus ad Visitatorem Religiosum pertinet semper singulis annis visitare fraternitates Tertii Ordinis, quae fuerint per totam Guardianiam, si ipse Guardianus nolit facere". Cf. for example the decisions of the Congregation of Bishops and Regulars which in all cases that can be applied to the Third Order Secular, limit the jurisdiction of the Ordinary of the place to that of vigilance over the funds and the proper conduct of divine cult as decreed in the Council of Trent: Aug. 2, 1581 (*Pontes*, n. 1387); June 12, 1582 (*o. c.*, n. 1396); 1589 (*o. c.*, n. 1421); Feb. 22, 1595 (*o. c.*, n. 1533); Sept. 7, 1598 (*o. c.*, n. 1573); Feb. 3, 1610 (*o. c.*, n. 1647); June 9, 1617 (*o. c.*, n. 1690); July 21, 1617 (*o. c.*, n. 1691); July 31, 1637 (*o. c.*, n. 1752); Oct. 5, 1646 (*o. c.*, n. 1780).

^a Bull, *Ite et Vos*, May 29, 1517 (*Bull. Rom.*, V, 692-698).

cluding the other Friars Minor from any jurisdiction, except with his permission. It pertains to him to garb with the habit, receive profession, erect Third Order Sodalities, and perform the canonical visitation." He is to propagate the Third Order by erecting Sodalities everywhere (§8), and where Sodalities have already been erected, another cannot be located without his permission, under pain of invalidity (§9). He is empowered to enact statutes, and in fact to change anything in regard to the Third Order which he may consider in the interest of its spiritual welfare, and which is not against the Rule (§8). Obedience to the Franciscan Superiors alone, is demanded of the Tertiaries in all things which pertain to the Rule, and in all controversies: expulsion by the Franciscan Superiors is to be the penalty of disobedience."

The most important point of this constitution is that the ordinary of the place is entirely and expressly excluded from any of these points of jurisdiction which have been enumerated."

Thus: a) the jurisdiction of the Friars Minor is supreme to the exclusion of all others; b) Third Order Sodalities are bound by the *lex loci* as contained today in canon 711 §1, but from which the Minister-General may dispense; (§9) c) since the ordinary of the place is positively excluded from all jurisdiction, he has no right to perform the canonical visitation in regard to the temporalities of the Tertiaries even in those Sodalities erected outside of Franciscan Churches; but where Tertiaries are located in a church or

" Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725 (*Bull. Rom.*, XXII, 285-294).

" § 7; "ad cassationem usque * * * habitus * * *;" (§ 8).

"* * * privative quoad alios quoscumque * * *"; and that there may be no mistake, the ordinary of the place is specifically excluded: "* * * seclis locorum ordinariis et aliis quibuscumque personis cujusve status * * *". (§ 8).

chapel which belongs properly to themselves, the ordinary of the place retains the right of visitation in reference to the altar and to the proper conduct of divine cult."

But the same pontiff on account of discordances which naturally arose due to this apparent exclusive subjection of the Tertiaries to the Friars Minor Observant, and because of the injustice which the other Franciscan Families felt themselves to have incurred, reaffirmed in favor of the Friars Minor Capuchin that jurisdiction which they had possessed before, so that they could erect Sodalities of Tertiaries, receive profession, instruct in the Rule, and provide for the spiritual welfare of the Tertiaries. Contrary to the declaration of the preceding Bull, they may erect in any place, even where others have already been founded."

For the same reasons, two weeks later Benedict XIII gave to the Minister-General of the Friars Minor Conventual all jurisdiction which had ever been accorded to him by former papal decrees; it was to be the same as that given in the Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, to the Friars Minor Observant; he also abolished the *lex loci*." That there would be no misunderstanding, he repeated the jurisdiction of the Friars Minor Conventual a second time, and at the same time gave additional reasons."

It is interesting to note that the Bull, *Paterna Sedis Apostolicae*, (quoted above as giving jurisdiction to the Friars

" Council of Trent, Sess. XXII, *de reformat.*, cap 8.

" Bull, *Ratio Apostolici Ministerii*, June 23, 1726 (*Bull. Rom.*, XXII, 367-370).

" Bull, *Singularis Devotio*, July 5, 1726 (*o. c.*, 370-373).

" "Etenim equum est ut ministro generali Ordinis * * * Conventualium B. Francisci, qui inter caeteros Ordines, sub uno et eodem Seraphico patre et capite Deo famulantes, vetustissimus est, omnem jurisdictionem, auctoritatem, facultates et gratias in Tertii Ordinis, ab eodem celeberrimo confessore instituti, poenitentes indulgeamus, quae aliis fratribus Minoribus indultae fuerunt * * * " (§ 5).

Minor Observant) was understood at the time of its promulgation as giving *exclusive* jurisdiction to the Friars Minor *Observant*, to the extreme that the other Families possessed no jurisdiction whatsoever; this is proven from the fact that dissensions arose as is mentioned in the two subsequent Bulls of the same pontiff, which gave jurisdiction to the Friars Minor Capuchin and Conventual as noted above. But the pontiff deprecates this in these latter decrees: (*Ratio Apostolici Ministerii*, §1)—“* * * litteras * * * perperam *detortas* fuisse intelleximus; * * * Tertiarii Cappucini * * * Minoribus a regulari observantia nuncupatis *nullo modo* subsunt; sed ministri generali * * * Minorum * * * qui Cappucini appellantur, * * *”. (*Signularis Devotio*, §1)—“Hanc * * * constitutionem [*Paterna Sedis Apostolicae*] * * * contra expressam mentem nostram, * * * *detortam* fuisse intelleximus”.

He thus states expressly that he did not wish to deprive the Friars Minor *Capuchin* and *Conventual* of jurisdiction over the Tertiaries. In the Bull, *Paterna Sedis Apostolicae*, the words ‘*de Observantia*’, are not used but rather the simple words ‘*ministri generali totius Ordinis*’. Doubtless it was understood as comprising only the *Observant* Family, because Leo X, May 29, 1517, by the Bull, *Ite et vos*,^a had given the General of the *Observants* the title ‘*Minister Generalis Ordinis Minorum*’, and also the place of precedence. Ferraris, without taking into consideration the words of Benedict XIII in his *subsequent* Bulls, quotes the Bull, *Paterna Sedis Apostolicae*, as being in favor of the Friars Minor *Observant*, and as *excluding* the Friars Minor *Capuchin* and *Conventual* from any jurisdiction over the Tertiaries.^b Hilarius Parisiensis,^c makes no comment in this particular regard in quoting these Bulls.

Despite the misleading words of Ferraris, the words of Benedict XIII are clear: by the Bull, *Paterna Sedis Apostolicae*, he did not suppress the jurisdiction of the Friars Minor *Capuchin* and *Conventual*—he only gave the *Observant* Family more privileges than the other two families enjoyed, but which he subsequently extended to them.

^a *Bull. Rom.*, V, 692-698.

^b Ferraris, s. v. *Tertiarii*, n. 26.

^c *Liber Tertii Ordinis*, p. 228-237.

These three Bulls were again confirmed in 1728, with the additional ruling that Tertiaries are not allowed to transfer from one Franciscan Family to another; the *lex loci* as laid down in the constitution, *Paterna Sedis Apostolicae*, was again to be enforced.⁴⁴ This last prescription was again abolished when Clement XII reaffirmed the jurisdiction of the Friars Minor Capuchin over the Tertiaries;⁴⁵ it has not been subsequently revived.

The Third Order Regular also enjoys the same privileges and rights toward the Secular Tertiaries, as was given to the Friars Minor Observant by the Bull, *Paterna Sedis Apostolicae*.⁴⁶ Pope Benedict XIV implicitly reaffirmed the jurisdiction of the four Franciscan Families when he granted a number of indulgences and privileges 'to the Brothers and Sisters of the Third Order Secular of Penance, under the care and direction of any Regular Order of St. Francis'.⁴⁷

There have been no changes in regard to the subjection of the Tertiaries to the Franciscan Religious, and therefore this point may rest with advantage by quoting the words of Pope Leo XIII in his Rule for the Third Order Secular of St. Francis: "The visitors" shall be chosen from the First

⁴⁴ Benedict XIII, Bull, *Dilecti filii*, July 22, 1728 (Ferraris, s. v. *Religionis Regulares*, Art. 5, n. 55: he quotes the Constitution in full; s. v. *Tertiarii*, n. 29, the date is given as June 21, 1728).

⁴⁵ Bull, *Apostolicae servitutis*, July 23, 1735 (*Bull. Rom.*, XXIV, 61 f.).

⁴⁶ Benedict XIII, Bull, *Exponi Nobis*, Sept. 30, 1729 (*Bull. Rom.*, XXII, 856-858).

⁴⁷ Bull, *Ad Romanum Pontificem*, March 15, 1751 (*Bull. Rom. Continuatio*, III, 285, § 5).

⁴⁸ The term 'visitor' is not limited merely to the one who performs the annual canonical visitation, but also embraces that Franciscan official who has the care and direction of a Third Order Sodality; cf. the *Rule of Leo XIII* (Pontes, n. 588), and the *Ceremonial of the Third Order Secular of St. Francis*, approved by the same pontiff and the S. C. of Rites June 18, 1883 (Fleming, *Leonis XIII Acta ad III Ordinem Spectantia*, p. 197-222).

Order or the Third Order Regular". (*Rule*, III §3).

It is not to be forgotten, however, that the secular clergy have exercised great influence over the Third Order. During its early existence it was the diocesan bishop who performed the canonical visitation, and even in the Rule of Nicholas IV in 1289, he only counseled (*consulimus*) that the visitors and informers (*informatores*) be taken from the Friars Minor. In the very first Rule of the Third Order there is provision made for clerics.* Many of the secular clergy were influential in sustaining the existence of the institution where there were no Franciscan Religious.**

The Statutes of Innocent XI make mention of this fact when they state that "in isolated localities (*in pagis*) the brethren and sisters of the Third Order may apply to a secular priest to obtain from the Father Guardian [Friar Minor] the power to take such care of them as is done by the religious visitor. They may likewise conduct the meetings and arrange for the election of the various officers. Still the right of the annual visitation is reserved to the religious visitor".†

Leo XIII in more recent times recommended to all the bishops, especially to those of Italy, that they apply to the Franciscan Superiors for faculties to invest in the Third Order.‡ Pius X also expressed the desire that the Third Order be established not only at the monasteries and churches of the Franciscan religious, but also in parishes under the care of the secular clergy, who should apply, with the approval of the bishop, to the Franciscan Superiors for faculties; however the right of the Franciscan Superiors

* *Regula Antiqua*, V, 2.

† Callaey, *The Third Order of St. Francis*, p. 39-46.

‡ Ad Cap. XVI.

§ Encyclical, *Auspicato*, Sept. 7, 1882 (*A. S. S.*, XV, 145-153).

must always be borne in mind." Benedict XV also expressed the same wish when he recommended that the Third Order be spread everywhere."

APPENDIX TO ARTICLE II

Concerning the Revocation of the Benedictine Constitutions giving Jurisdiction to the Friars Minor

A great number of Constitutions given out by authority of Benedict XIII throughout were revoked at least in part by his successor, Clement XII, March 29, 1732."

Among the Bulls which he specifically mentions, are those by which Benedict XIII had completely subjected the Franciscan Tertiaries to the jurisdiction of the four Franciscan Families, to the exclusion of the ordinaries of the places, and which have been quoted throughout this article as having the force of law. Hence the importance of discovering the mind of Clement XII and of consequently determining which juridical points of the Benedictine constitutions he wished to abolish; which points he wished to retain the force of law.

The four constitutions of Benedict XIII giving jurisdiction to the Franciscans which are mentioned in the Bull of revocation are: *Paterna Sedis Apostolicae*, Dec. 10, 1725, in favor of the Friars Minor Observant," *Ratio Apostolica Ministerii*, June 23, 1726, in favor of the Friars Minor Capu-

"Const., *Tertium Franciscalium Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 584 f).

"Encyclical, *Sacra Propediem*, Jan. 6, 1921 (A. A. S., XIII [1921], 33-41).

"Bull, *Romanus Pontifex* (Bull. Rom., 323-327); the complete list coming under this revocation is given in § 1 of this Bull.

"Bull. Rom., XXII, 285-294.

chin," *Singularis devotio*, July 5, 1726, in favor of the Friars Minor Conventual," *Exponi nobis*, Sept. 30, 1729, in favor of the Third Order Regular." There were also others mentioned in the revocation which concerned the privileges granted to various religious organizations, and which will be used here to prove that the revocation was not in whole, but rather only in part. At first sight it would appear that Clement XII had completely *abolished* all the Benedictine constitutions which he mentions in the revocation, for he uses the words: *ac si constitutiones illae non emanassent*;" but from the subsequent practice of the Holy See and the opinions of prominent authors it can be seen that he revoked them only *in part*, namely in those things which tended to foment dissension and which impeded the jurisdiction of the bishops, regarding not *Secular Tertiaries*, but rather concerning those who lived *collegiately*, and also those who lived a *quasi-religious life in their homes* whom Benedict XIII had placed under the complete jurisdiction of the Friars Minor, '*exclusis locorum ordinariis*'."

In order to prove that the force of the Constitutions of Benedict XIII regarding the jurisdiction of the Franciscans over the *Secular Tertiaries* was not lost or abolished through the revocation of Clement XII, a three-fold argument will be used:

A) The Benedictine Constitutions mentioned by Clement XIII were not revoked in whole. B) The revocation of Clement XII had special reference to the juridical subjection of collegiate Tertiaries and of women who lived a quasi-religious life in their homes whom Benedict XIII had freed from the jurisdiction of

" O. c., 367-370.

" O. c., 370-373.

" O. c., 856-858.

" § 2 of the Bull of revocation.

" Cf. for example the Bull, *Paterna Sedis Apostolicae*, in favor of the Friars Minor Observant (o. c. 289 § 8) where these words are used.

the bishops and placed entirely under the care of the religious Orders. O) The revocation of Clement XII did not affect the jurisdiction which Benedict XIII had conceded to the Friars Minor over the Secular Tertiaries.

A) The Benedictine Constitutions mentioned by Clement XII were not revoked in whole:

The following decisions of the Holy See indicate this:

The Order of Canonical Regulars of the Holy Redeemer, having been conceded many indulgences and privileges by Benedict XIII in his constitution, *In Sede*, March 26, 1729 (which was mentioned in the revocation), requested of the S. Congregation of Indulgences whether these privileges were revoked by Clement XII, using in the petition the argument in their favor that 'only those privileges which were contentious' were revoked. The following question was asked: "*An per moderationem seu revocationem expressam Bullae [In Sede] favore Regularium editae Indulgentiae ipsis a Benedicto XIII concessae, necnon privilegium altaris intelligatur revocatum?*" Response: "Negative".⁷²

Another Bull which came under the revocation of Clement XII was *Pretiosus*,⁷³ concerning privileged altars which he had extended under certain conditions to Chapels of the Confraternity of the Rosary; being asked whether the altar was also privileged in regard to deceased brethren, the Congregation of Indulgences replied in the negative; but it did not give this reply because the privilege of Benedict XIII was revoked, but 'quia recensitum privilegium * * * a s. m. Benedicto XIII ad quaecumque altare Rosarii extensum, tantummodo privilegium personale est'.⁷⁴ Therefore this privilege is in force despite the revocation of Clement XII.

The same argument may be used from the words of Leo

⁷² Jan. 23, 1733 (*Decreta Authentica S. C. Indulg.*, n. 105).

⁷³ May 25, 1725 (*Bull. Rom.*, XXII, 552-554).

⁷⁴ Nov. 27, 1764 (*Decreta Authentica S. C. Indulg.*, n. 233).

XIII^m who states that he revokes certain privileges granted to the Friars Preachers by Benedict XIII;^m the privilege which he revoked had been given in the Bull *Pretiosus* which was mentioned by Clement XII in his revocation; since Leo XIII cannot revoke that which had already been revoked by Clement XII, it necessarily follows that *he did not consider the revocation of Clement XII to have abolished this particular privilege. Therefore the Bull, Pretiosus, was not entirely revoked by Clement XII.*

Similar force can also be deduced from the words of the Congregation of Indulgences approving a list of Indulgences for the Archconfraternity of the Rosary: "*Pius IX confirmed all the indulgences granted by his predecessors which are herein accurately transcribed*".^m One of the Indulgences which he thus confirmed^m is taken from this same Bull, *Pretiosus* §5. Arguing from the words of the Congregation it is clear that Pius IX did not *grant* these indulgences, but rather *confirmed them as already having force* due to their concession by his predecessors.

In a dispute between the Franciscan Tertiaries of Valletta and the Friars Minor Observant,^m the latter denied the right of the former to march in the same procession under the cross of the religious.^m The Tertiaries appealed to the Congregation of Bishops and Regulars, citing in their favor^m the Bull, *Paterna Sedis Apostolicae* of Benedict XIII, Dec. 10, 1725, §X;^m this is one of the principal Bulls giving jurisdic-

^m Const. *Ubi primum*, Oct. 10, 1898 (A. S. S., XXXI, 257-263).

^m In the above-mentioned Bull, *Pretiosus*, § 4.

^m S. C. of Indulg., Sept. 18, 1862 (*Rescripta Authentica S. C. Indulg.*, p. 427).

^m O. c., p. 421.

^m A. S. S., XXVI, 485-498.

^m O. c., 485 f.

^m O. c., 491.

^m The *Bull. Rom.*, XXII, 290, cites this privilege under § IX.

tion to the Friars Minor over the Tertiaries. The rights of the Tertiaries were upheld by the Congregation Aug. 25, 1893," thereby implying that despite the revocation of Clement XII, this Bull still retained its vigor, at least in this regard. These decisions are sufficient to prove that Clement XII did not *entirely* revoke the Constitutions of Benedict XIII which he gives in his list.

B) The revocation of Clement XII had special reference to the juridical subjection of collegiate Tertiaries and of women who lived a quasi-religious life in their homes whom Benedict XIII had freed from the jurisdiction of the bishops and placed entirely under the care of the Religious Orders:

Clement XII desired to return that jurisdiction to the bishops which Benedict XIII had given to the Regulars in regard to the *collegiate* Tertiaries. The latter had declared that not only all *secular*, but also all *collegiate* Franciscan Tertiaries who did not place themselves under the jurisdiction of the Friars Minor to the exclusion of the bishops, were to be deprived of all indulgences and privileges." Thus in 1736 such (collegiate) Tertiaries asked the S. C. of Indulgences whether, notwithstanding the fact that they were now under the jurisdiction of the bishops, they still partook of the indulgences and privileges of the Order; the Congregation replied in the affirmative," evidently taking into consideration that Clement XII had returned the *collegiate* Tertiaries to the jurisdiction of the bishops when he revoked the Constitutions of Benedict XIII.

Benedict XIV in treating this question, exhibits decrees of the Congregation of Bishops and Regulars which very clearly demonstrate that the questions involved were those regarding whether *collegiate* Tertiaries were subject to the

" Ad II (A. S. S., XXVI, 497 f).

" E. g. in the Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725.

" Dec. 3, 1736 (*Decreta Authentica S. C. Indulg.*, n. 118).

Regular Orders or to the Bishops." He then goes on to explain that if nothing had been changed after the Constitutions of Benedict XIII, the bishops would surely enjoy no jurisdiction over these collegiate Tertiaries; but since the Bull, *Romanus Pontifex* of Clement XII revoked the rights of the Friars Minor in this regard, '*res tota ad eos limites restituenda est, quibus ante Benedictinum XIII. concluderetur, et quos antea recensuimus.*' Unde redditur Episcopo pristina auctoritas, quam in has [collegiatis] Tertiarias exercebat, et ob hanc causam ipsis Sacram Visitationem indiximus'."

The S. C. of the Propagation of the Faith in an instruction given 1763, quotes these words of Benedict XIV" and expressly states that the revocation of Clement XII had reference to those Tertiaries as mentioned above."

The same is true of the canonist Ferraris, who after declaring that the *Collegiate* Tertiaries were subjected to the jurisdiction of the Franciscans and the Dominicans to the

"*Institutiones Ecclesiasticae*, CV, LXXVIII in particular; the entire Article § II, beginning with LXXIII indicates this.

"O. c., LXXIX; he gives the former status in the numbers immediately preceding.

"O. c., LXXX.

"The Instruction quotes the *Institutes* as 105, 76; the edition of Rome 1785 and Prati 1884 of the *Institutes* quotes these words of Benedict XIV under 105, 80, with slightly different wording than that given in the Instruction; the meaning however is the same.

"*Collectanea S. C. de Prop. F.*, n. 448; that the Tertiaries concerning whom the Instruction speaks are not Franciscan Secular Tertiaries is very clear from the words of the Congregation concerning the conditions of membership: " * * * ac in aetate saltem quadraginta annorum constitutas, quae de proprio habent unde sufficienter vivere possint, et non cum aliis viris quam consanguineis, vel affinis in primo tantum gradu sibi conjunctis cohabitent, et ab Ordinario loci prius licentia impetrata, qui non aliter eam concedat, nisi de praedictis examine diligenti sibi constiterit". There never was such a condition of membership in the Third Order Secular of St. Francis.

exclusion of the bishops, by the Constitutions of Benedict XIII,^a adds, that now, due to the Constitution *Romanus Pontifex* of Clement XII, the bishops enjoy the same authority over these collegiate Tertiaries as they possessed before the Benedictine Constitutions."

O) The revocation of Clement XII did not affect the jurisdiction which Benedict XIII had conceded to the Friars Minor over the Secular Tertiaries:

Although not expressly mentioned, this is clearly insinuated by the Instruction of the Congregation of the Propagation of the Faith mentioned above. In its preliminary remarks, the Congregation mentions that serious dissensions have arisen regarding the respective rights of the bishops and the regulars over these Tertiaries, 'because the Apostolic Constitutions have not been fully known and clearly understood on this point'.^a The Instruction then follows and demonstrates that the Constitution *Romanus Pontifex* of Clement XII returned that jurisdiction to the bishops over *Collegiate* Tertiaries and those who lived a quasi-religious life in their homes (the description of which is given above, note 90), which they had enjoyed before the Benedictine Constitutions. The Instruction does not even touch on the question of secular Tertiaries. If the Clementine Constitution had abrogated the rights conceded by Benedict XIII to the Friars Minor over the *Secular*, as well as the *Collegiate*, Tertiaries, the Sacred Congregation, treating the question of jurisdiction *ex professo*, would without doubt

^a Ferraris, s. v. *Tertiarii*, n. 52.

^a "Unde, ut vides, et recte tradit Bened. XIV, volum. V. notificat. 17, § 2, redivit in pristinum jurisdictionem ordinariorum supra Tertiarias *collegialiter* viventes, ac si minime emanassent dictae Benedictinae Constitutiones, * * * " (o. c., n. 54).

^a " * * * quod Pontificum Constitutiones omnes hac de re non satis sint notae, ac privilegia a Sede Apostolica Tertio Ordini concessa non probe intelligantur".

have decided that the rights of the Friars Minor over the former as well as the latter, were lost by the revocation of Clement XII. Were this revocation universal, the Congregation could the more easily have decided the question by simply stating that the jurisdiction of the bishops over *all* Tertiaries is the same as it was before the Benedictine Constitutions; but by distinguishing between the two and mentioning this change of jurisdiction only of the *Collegiate* Tertiaries (whose conditions of membership it describes in detail in order to make itself clear) the logical conclusion is that the status of the Secular Tertiaries was not changed by Clement XII. The same argument may be applied to the Institutes of Benedict XIV quoted above.

Ferraris is still more clear on this point. He quotes the four Constitutions of Benedict XIII as giving jurisdiction to the Friars Minor over the *Secular* Tertiaries, particularly that given in favor of the Observant Family of the Order (*Paterna Sedis Apostolicae*) which he quotes verbatim because it contains the basic elements of all four Constitutions.⁴⁸ He adds nothing here concerning their revocation, thereby attributing to them the force of law, in his opinion. But when he goes over to the treatment of *Collegiate* Tertiaries he prohibits the use of these same Constitutions and the Constitution, *Pretiosus*,⁴⁹ as having value concerning the jurisdiction of Regulars over *Collegiate* Tertiaries, because these Constitutions together with others, have been reduced to the terms of common law by Clement XII,⁵⁰ and therefore 'redit in pristinum jurisdictio ordinariorum locorum supra Tertiarias *Collegialiter* viventes, ac si minime emanassent

⁴⁸ Ferraris, *s. v. Tertiarii*, nn. 26-35.

⁴⁹ May 25, 1727, in favor of the Friars Preachers (*Bull. Rom.*, XXII, 522-554).

⁵⁰ Ferraris, *s. v. Tertiarii*, nn. 52-54.

dictae Benedictinae constitutiones eas a tali jurisdictione eximentes'."

In two instances Clement XII himself implies that the points of the Benedictine Constitutions giving jurisdiction to the Friars Minor over the *Secular Tertiaries* remain intact despite his own revocation—1) Upon the request of the Minister-General of the Friars Minor Capuchin he declared that the Capuchins are legitimate sons of St. Francis and therefore enjoy the right of receiving into the Third Order, and the Tertiaries whom they receive enjoy the same privileges as others, no matter upon what Minister-General they are *dependent* (a quocumque ministro generali dependentium)."⁹⁷ It was in fact through the Benedictine Constitutions that the Tertiaries were placed in a state of *dependence* on the Friars Minor to the exclusion of the ordinaries of the places. b) In the list of Bulls which he mentions as coming under his revocation he cites the four giving such jurisdiction to the Franciscans," but he fails to name a fifth, *Dilecti Filii*, June 21, 1728¹⁰⁰ which confirms these four explicitly regarding the jurisdiction of the Franciscans over the Secular Tertiaries; from which the conclusion must necessarily be drawn that he desired this jurisdiction to retain its force.

The Congregation of Bishops and Regulars in a dispute between the Friars Minor and a local ordinary (episcopus Narniensis), implicitly affirmed this jurisdiction as given by Benedict XIII, when, being asked whether the former may receive into the Third Order '*irrequisito Ordinario*', it re-

⁹⁷ O. c., n. 54.

⁹⁸ Bull, *Apostolicae Servitutis*, July 23, 1735 (*Bull. Rom.*, XXIV, 61 f).

⁹⁹ Cf. above: the beginning of this appendix.

¹⁰⁰ The pars dispositiva of this Bull is given in Ferraris, o. c., n. 29.

plied in the affirmative (affirmative, absque tamen ulla exemptione).¹²²

The question is definitely settled by a decision of the same Congregation in 1740. In a dispute between the Friars Minor *Observant* and the Friars Minor *Discalced*, the former contended that the latter had no rights of jurisdiction over the Secular Tertiaries. In its decree on the question the Congregation admonishes that all legitimate sons of St. Francis, no matter by what name they may be called, partake of the jurisdiction *which was accorded to all Franciscans by the Apostolic Constitutions of Benedict XIII and Clement XII.*¹²³ *'Therefore there is no reason why the Discalced Friars Minor cannot use this same privilege, since they are legitimate sons of St. Francis, * * * and the Congregation defines it in this manner.'*¹²⁴ Benedict XIV approved this decree and embodied it in his Constitution, *Laudabile*, Aug. 2, 1745.¹²⁵ Neither can it be said that the Congregation is *reviving* the Benedictine Constitutions, for the context of the decision indicates beyond a doubt that the Congregation considered this jurisdiction as granted by Benedict XIII to be in existence at the time of the dispute, even before the decision was rendered.

The weight of authors who cite one or more of the Constitutions of Benedict XIII in order to prove the present status of the Secular Tertiaries of St. Francis, may also be cited as a proof.¹²⁶

¹²² Sept. 5, 1738 (Ferraris, *o. c.*, n. 51).

¹²³ The latter is the Bull of Clement XII repeating the jurisdiction of the Friars Minor Capuchin as given above note 98.

¹²⁴ *S. C. of Bishops and Regulars*, Sept. 11, 1740 (*Bull. Rom. Continuatio*, I, 548 f).

¹²⁵ *O. c.*, 547-550.

¹²⁶ Vermeersch, *De Religiosis Institutis et Personis*, I, n. 536; Piat, *Praelectiones Juris Regularis*, II, Q. 71; Ferreres, *Institutiones Canonicae*, I, n. 976; Ferraris, *s. v. Tertiarii*; Ojetti, *Synopsis Rerum*

Conclusion: The Benedictine Constitutions had given complete jurisdiction to the Regular Orders over both Collegiate and Secular Tertiaries, to the exclusion of the ordinaries of the places. Clement XII revoked the rights of the Regulars over the Collegiate, but did not change the status of the Secular Tertiaries. Therefore the Constitutions of Benedict XIII have juridical value as regards the authority of the Friars Minor over the Third Order Secular of St. Francis.

ARTICLE III

Pre-Code Legal Status of the Order In the Eyes of the Church.

Exemptions.

Since the feudal system in the middle ages was abused to a great extent and therefore the oath of fealty was often the cause of much oppression of the poor, Honorius III realized that this close affiliation and relation of the Tertiaries with the secular powers would be a great stumbling block to them in the attainment of their spiritual and material ends: the acquirement of perfection and the alleviation of the sufferings of the sick, the poor and the dying as prescribed in their Rule.¹ He therefore freed the Tertiaries of Fienza from three important obligations—that of a) bearing arms; b)

Moralium et Juris Pontificii, s. v. Tertiarii; Antonius de Cipressa, *Regula sive Modus Vivendi Fratrum de Poenitentia S. Francisci*, p. 36-43; Mocchegiani, *Collectio Indulgentiarum*, n. 1529; Mocchegiani, *Jurisprudentia Ecclesiastica*, II, n. 675; Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 228-237; Mileta, *Trattato giuridico sul Terz' Ordine Secolare*, p. 47; Tachy, *Les Tiers Ordres*, p. 5 f; Tischler, *Handbuch zur Leitung des Dritten Ordens*, p. 55; Holzapfel, *Die Leitung des Dritten Ordens*, p. 68-79; Stein, *Tertius Ordo Francoscalis*, p. 43-46.

¹ Cf. *Third Order Forum*, I [1922], p. 21.

doing military service; c) taking oaths;³ at this time he also implicitly confirmed the Third Order. In 1228 Gregory IX confirmed the Bull of his predecessor when he issued a decree in their favor. However, since it was necessary for the brethren to take oaths at times, he made the following exceptions to the Rule Bull of Honorius III: the Tertiaries could take an oath—to preserve peace; to maintain the faith; to clear themselves of a calumny, and to bear witness in court.⁴ By this Bull Gregory IX extends to the Tertiaries of entire Italy, the favors formerly granted by Honorius III and himself to particular groups of Tertiaries. This was again confirmed by Innocent IV in 1252.⁵

However, since the faithful flocked to the standard of the Order in such great numbers, the privilege of not bearing arms had to be mitigated. Therefore in the Rule published by Nicholas IV in his Bull, *Supra montem* (1289), he allows the Tertiaries to bear arms 'in the defense of one's country, of the Church, for the faith of Christ, and for a reason approved by the ministers.'⁶ This Bull is the solemn approval of the Order; it also repeats the legislation of Gregory IX regarding the taking of oaths, with the exception that they may be taken for reason of 'contractu emptionis, venditionis, et donationis.'⁷

Another important privilege of the Tertiaries was that

³ Bull, *Significatum est nobis*, Dec. 16, 1221 (*Bull. Franc.*, I, n. 8, p. 8).

⁴ Bull, *Detestanda*, March 30, 1228 (*o. c.*, n. 20, p. 39 f); the prescription of this Bull is contained in the *Regula Antiqua*, V, 4; but since in 1221 (when the first Rule was written) Honorius III decreed that they should *not* take an oath, it follows that this part was not added to the original Rule till the year 1228.

⁵ Bull, *Detestanda*, Apr. 11, 1252 (*Bull. Franc. Epitome*, n. 609a); this is merely a repetition of the Bull, *Detestanda*, of Gregory IX.

⁶ Cap. VII.

⁷ Cap. XII.

they were not obliged to accept public office; this was granted by Gregory IX and was repeated in after years.' The fact that the Tertiaries were exempt from taking oaths except in particular cases allowed by the Rule, gave them the exemption of being cited not in a civil, but in an ecclesiastical court before the bishop: the *privilegium fori*.⁹ This was certainly an important privilege to be granted to lay persons and is evidence of the high esteem in which the Third Order was held by the Holy See. The Tertiaries were to pay their legitimate taxes but were excused from them if they were unjust¹⁰—a great blow to the extreme burdens which at times were placed upon the shoulders of the poorer classes. Devotion to, and faith in, the Church and its legitimate representatives were always the keynotes in the lives of the Tertiaries; the bishops were to stop vexations by the local lords;¹¹ postulants were to be purged from the suspicion of heresy by him before being allowed to enter the Order;¹² a Friar Minor was to be called to settle disputes among the brethren.¹³

In fact, so great was the standing of the Tertiaries in the eyes of the Church that Pope Sixtus IV, following the opinion of canonists of that time, went so far as to consider them

⁹ Bull, *Nimis patenter*, June 25, 1227 (*Bull. Franc.*, I, n. 7, p. 30 f); *Cum dilecti*, June 4, 1230 (*o. c.*, n. 53, p. 65 f); *Nimis Patenter*, Apr. 5, 1231 (*o. c.*, n. 69, p. 71); *Ne is*, March 15, 1233 (*o. c.*, n. 94, p. 99); Alexander V, *Pia desideria*, Apr. 27, 1255 (*o. c.*, II, n. 50, p. 42).

¹⁰ *Regula Antiqua*, X, 3; XIII, 13; Pope Celestine V confirmed this by the Bull, *Desiderius vestris*, Sept. 2, 1294 (*Bull. Franc.*, IV, n. 2, p. 330; cf. also *o. c.*, n. 3).

¹¹ Gregory IX, Bull, *Nimis patenter*, June 25, 1227 (*Bull. Franc.*, I, n. 7, p. 30 f); also by the Bull, *Detestanda*, of the same pope, March 30, 1228 (*o. c.*, n. 20, p. 39 f).

¹² *Regula Antiqua*, X, 2-3.

¹³ *O. c.*, XI, 1.

¹⁴ *A. F. H.*, I [1908], p. 549, n. X.

as ecclesiastical persons with all their rights." Six years later he extended this still farther by declaring that the Tertiaries of both Franciscans and Dominicans had all the material and spiritual privileges of both First Orders, no matter what they may be."

The ownership and property rights of a legitimately organized group of Tertiaries could not be infringed upon after the fraternity had once been canonically established. At times the civil rulers attempted to seize these goods, but were reprimanded by the Holy See; thus in 1228 Gregory IX denounced the civil magistrates who attempted to prevent the Tertiaries from distributing their goods among the poor." Nicholas IV also remonstrated with the bishop of Florence, who attempted the same injustice against the Tertiaries."

A commendable fact in favor of the Tertiaries was that, notwithstanding their immunity from accepting public office, the civil authorities often attempted to give them official positions, no doubt due to their honesty and integrity;" at

"Sixtus IV, Bull, *Sacrosancta*, Nov. 20, 1473 (Wadding, *Annales Minorum*, XIV, 86-88); cf. Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 122 f.

"* * * statuimus quod procuratores, syndici, oblatis et utriusque tertii Ordinis praedicti de Poenitentia [the Third Order of St. Dominic was also called *Ordo de Poenitentia* (S. Dominici)], nuncupatae personae praedictae iisdem privilegiis, immunitatibus, gratiis, favoribus concessionibus, facultatibus et indultis spiritualibus et temporalibus, praedictis fratrum Praedicatorum et Minorum Ordinibus ac illorum professoribus, domibus et locis, ac procuratoribus, syndicis, oblatis et commissis, seu alias quomodolibet per praedecessores nostros aut nos hactenus concessis et in posterum concedendis, * * * ac personis utriusque sexus de Poenitentia huiusmodi, nominatim concessa forent et concederentur expresse."—Bull, *Sacri Praedicatorum et Minorum*, July 26, 1479 (*Bull. Rom.*, V, 280, § 7).

"Bull, *Detestanda*; cf. above, footnote 8.

"Sept 20, 1291 (*Bull. Franc.*, IV, n. 551, p. 293 f).

"Cf. Callaey, *The Third Order of St. Francis*, p. 26 f.

times they were permitted to do this, especially in their care of hospitals and municipal properties; in this event the civil authorities could demand the inspection of their account books."

They also had the right of exemption from interdict in regard to their spiritual exercises; Honorius III permitted them to perform their spiritual functions where divine services were allowed to be held by Apostolic Indult during the time of interdict." In 1264 this privilege was also accorded to the Tertiaries of Tuscia." At times it was abused, and therefore some congregations of Tertiaries were deprived of it for a time," while others lost the use of it altogether."

However, these local changes did not affect the general status of the penitents (Tertiaries) in this regard, for several papal decrees favored it," in particular that of Sixtus IV."

It was but natural that as the privileges of the Regular Orders were curtailed, especially in certain countries, so also

"O. c., p. 28.

"* * * cum igitur per Italiam tales esse nonnulli dicantur, a quibus fratres de poenitentia nuncupati, discretioni vestrae per Apostolica scripta mandamus, quatenus vos eos in ecclesiis, in quibus a Sede Apostolica est concessa generaliter tempore interdicti hujusmodi; dummodo ipsi causam Interdicti non dederint; ad divina officia, quae suppressa voce, Interdictis, et Excommunicatis exclusis, non pulsatis campanis, et clausis januis celebrantur; et Ecclesiastica Sacramenta, necnon sepulturam Ecclesiasticam admittatis."—Dec. 1, 1224 (*Bull. Franc.*, I, n. 16, p. 19 f).

"Urban IV, July 5, 1264 (*Bull. Franc. Epitome*, n. 1200).

"John XXII, March 1, 1322 (*Bull. Franc.*, V, n. 462, p. 222 f).

"Clement V, Nov. 14, 1306 or Nov. 13, 1307 (*o. c.*, n. 95, p. 42).

"Innocent IV, Aug. 31, 1357 (*o. c.*, VI, n. 726, p. 306); Boniface IX, June 24, 1403 (*o. c.*, VII, n. 465, p. 170); Martin V, Dec. 8, 1427 (*o. c.*, n. 1800, p. 692).

"Quoted above in footnote 14; since they were conceded all the privileges of the Friars Minor, one of which was exemption from interdict (by decree of March 29, 1222—*o. c.*, n. 10, p. 9), this privilege was also communicated to them.

were those of the Tertiaries withdrawn, particularly in regard to temporalities. In 1514 Pope Leo X confirmed all the liberties and ecclesiastical immunities granted to the Tertiaries by previous papal decrees, and which religious persons enjoyed 'quatenus sunt in usu.'²² But two years later the same pope declared that the Tertiaries could be cited in a secular court, and that they were obliged to accept all offices which ordinarily were incumbent upon the laity. They, however, retained the right of choosing their place of burial, and of access to divine services during the time of interdict, provided they had not been the cause of the interdict, or that they had not fomented the cause of this condition in any way.²³ Thus the Tertiaries were deprived of the *privilegium fori, canonis, and immunity from civil offices*;²⁴ but where the contrary custom prevailed, Tertiaries were still allowed to retain the right of exemption;²⁵ it was definitely declared to be abolished by the same Congregation, May 13, 1727²⁶ and authors agree that after these decisions these privileges were no longer enjoyed by the Secular Tertiaries.²⁷

The most plausible reasons that the Secular Tertiaries enjoyed these privileges are because they wore the full habit of the Franciscan Order, and also for the reason that the Rule which they followed was almost as strict as the Religious Orders of that time; hence in the wide sense they

²² Bull, *Exponi Nobis*, Jan. 6, 1514 (Wadding, *Annales Minorum*, XV, 665 f).

²³ Bull, *Dum Intra*, Dec. 19, 1516 (*Bull. Capuc.*, VI, 224).

²⁴ Ferraris, *s. v. Tertiarii*, n. 22; the same tenor was expressed several times by the *S. C. of Immunity*: July 26, 1633; Nov. 22, 1633; July 19, 1635; Sept. 7, 1638; Dec. 20, 1667; May 13, 1727 (*Ibidem*); cf. Bened. XIV, *Institutiones Ecclesiasticae*, CV, LXVIII; Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 136, n. 5.

²⁵ *S. C. of Immunity*, May 19, 1695 (Ferraris, *o. c.*, n. 23).

²⁶ Ferraris, *l. c.*

²⁷ Ferraris, *s. v. Tertiarii*, n. 59; cf. Bened. XIV, *Institutiones Ecclesiasticae*, l. c.; Hilarius Parisiensis, *Liber Tertii Ordinis*, l. c.

were considered as ecclesiastical persons, and were accorded the same privileges. But when in public they gradually assumed the scapular and cord in place of the full habit,²¹ and their Rule of life was mitigated, they lived more as seculars, and hence were looked upon as such, rather than as religious and clerics: therefore the logical sequence was that their temporal exemptions were to be no more bountiful than those given to the laity in general.²²

The privileges granted to the Tertiaries were without doubt the greatest and most munificent that have ever been accorded to any lay association by the Holy See. The solemn approval of the Third Order in 1289, and its implicit sanction through these concessions are indicative of the great esteem in which the organization, its members and its principles were held by the Roman pontiffs.

ARTICLE IV

Changes in the Third Order Secular of St. Francis.

§ 1. Adaptation of the Third Order to Changing Times.

Privileges.

A considerable number of privileges, especially temporal, have already been considered in the treatment of the question regarding the legal status of the Order and its consequent approval by the Holy See. The first change in the Rule itself is that of taking oaths, which had been forbidden

²¹ Cf. Ferraris, *o. c.*, nn. 36 and 55.

²² *Liber Joannis a Capistrano: Defensorium privilegiorum Tertii Ordinis*. The work is not accessible; the points taken from his defense are given above from Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 133, n. 14; for the complete *Defensorium*, cf. *Ibidem*, p. 803-845.

under all conditions by Honorius III in 1221,¹ but which Gregory IX allowed 'to preserve peace, to maintain the faith, to clear themselves of a calumny, and to bear witness in court'.²

The Rule given by Nicholas IV, with its accompanying solemn approval of the Order, changed very little but rather concerned itself with a more systematic arrangement.³ Between the time of the first Rule and that of Nicholas IV, changes had been made regarding the frequentation of the Sacraments of confession and communion: the first Rule (V, 1) prescribes confession and communion three times a year, while XIII, 3 demands monthly confession; the latter, which was obviously added at a later date, would also seem to imply more frequent communion. An Italian text of the Rule⁴ demands weekly confession and daily attendance at Mass: it would not be extending the text to assert that this Rule presupposed the reception of Holy Communion more than three times yearly. Nicholas IV in his rule again changed this to three times yearly (Cap. VI).

But this did not prevent the Tertiaries from going more often if they desired: the Holy See itself favored the more frequent reception of the Sacraments when it allowed the Tertiaries access to divine services during the time of interdict. The Statutes of Innocent XI mentioned that the

¹ Bull, *Significatum est Nobis*, Dec. 6, 1221 (*Bull. Franc.*, I, n. 8, p. 8).

² Bull, *Detestanda*, March 30, 1228 (*o. c.*, n. 20, p. 39 f); this was added to the original Rule (*Regula Antiqua*) under V, 4.

³ Bull, *Supra Montem*, Aug. (for the exact date cf. p. 38 above), 1289 (*Bull. Franc.*, IV, p. 94-97); the Rule is also contained in: *Seraphicae Legislationis Textus Originales*, 77-94; Antonius de Cipressa, *Regula sive Modus Vivendi Fratrum de Poenitentia S. Francisci*, p. 63-81.

Eucharist should be received for grave causes to be determined by the visitor; also on all feasts of Our Lord, the Blessed Virgin, the saints of the Order and at other times according to the discretion of the confessor.' The Rule of Leo XIII mentioned that it should be received monthly (II §5).

Nicholas IV made no noteworthy changes in regard to fasting. In 1527 Clement VII changed the beginning of the daily fast by placing it, not on the feast of St. Martin (as in the Rule of Nicholas IV, V), but on the first Sunday of Advent.' Paul III confirmed this and mitigated the fasts prescribed by Nicholas IV by abolishing the Monday abstinence, and also the fasts on all Wednesdays between the feast of All Saints and Easter; this change was originally made only for the Tertiaries of Spain, Portugal and the West Indies, but was later adopted for all Tertiaries.'

The Third Order has always been privileged with many indulgences and other spiritual benefits. In 1307 Clement V granted indulgences to Tertiaries for reading the Rule; Boniface IX made the concession of a plenary indulgence at the hour of death.'

Papal munificence could not have been any greater and more favorable than that of Sixtus IV, for in 1479 he granted to the Third Order Secular of St. Francis the complete and plenary communication of all indulgences and privileges, both temporal and spiritual, which has been given in the past or were to be given in the future to the Order of Friars

'A. F. H., XIII [1920], p. 38.

'Ad Cap. VI.

'*Orbis Seraphicus*, II, 903-911.

'Wadding, *Annales Minorum*, XVIII, 435-460; chap. 6, p. 467 f); cf. *Statuta Innocentiana*, Ad cap. V.

'A. F. H., I [1908], p. 114.

'Nov. 22, 1402 (*Bull. Franc.*, VII, n. 435, p. 156).

Minor and the Order of Preachers, and to any of their members or places under their care; hence besides the great number of indulgences, this concession also included immunity from interdict, the privilege of celebrating Mass on a portable altar, (*altare portatile in quovis honesto loco, etiam tempore interdicti*),¹⁰ and innumerable other benefits, both temporal and spiritual.¹¹ Clement VII and Paul III extended this to include the communication between the Third Order and the four mendicant Orders.¹²

Benedict XIII, due to misunderstandings which had arisen, renewed all privileges and indulgences which had previously been granted; for the sake of clarity, the text is given in full:

"Quascumque insuper litteras et gratias tam spirituales quam temporales, concessionones, indulgentias, exemptiones, indulta, privilegia, communicationes, extensiones, libertates, prearogativas, favores, peccatorum remissiones, et similia, tam in genere quam in specie, fratribus et sororibus de Poenitentia. eorumque monasteriis, domibus, conservatoriis, aut aliis quovis nomine nuncupatis habitationibus, ecclesiis etiam, oratoriis et capellis, vel immediate et directe, aut etiam per communicationem cum aliis Ordinibus et praesertim fratrum Minorum, a Romanis Pontificibus antecessoribus nostris quomodolibet concessa (quorum tenorem, ac si de verbo ad verbum his nostris litteris insereretur, haberi volumus pro expresso) harum serie approbamus et confirma-

¹⁰ Granted to the Friars Minor Conventual and the Tertiaries by the same Pontiff in the Bull, *Regimini universalis Ecclesiae*, Aug. 31, 1474, § 4 (*Bull. Rom.*, V, 217-223); this Bull is called the *Mare Magnum* of the Franciscan Order on account of the great number of privileges it contains—cf. *o. c.*, 217; Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 124.

¹¹ Bull, *Sacri Praedicatorum et Minorum*, July 26, 1479 (*Bull. Rom.*, V, 278-283, § 7; also in *Bull. Capuc.*, VI, 199-203); this Bull is called the *Bulla Aurea* of the Franciscan and Dominican Orders for the same reasons as given in the footnote above; the text of the concession is quoted above p. 61.

¹² Ferraris, *s. v. Tertiarii*, n. 50.

mus, ac, pro potiori cautela, apostolica auctoritate singula de novo concedimus et largimur.”²²

Clement XII also added the communication of indulgences with the Brothers and Sisters of the Confraternity of the Blessed Virgin of Mt. Carmel. This was given only for the Tertiaries under the jurisdiction of the Friars Minor Capuchin,²³ and was later recalled by Benedict XIV.²⁴ However, due to various decrees of the Holy See which had rendered many of the indulgences and privileges doubtful,²⁵ Benedict XIV revoked all indulgences and privileges heretofore granted and at the same time drew up a new authentic list.²⁶ One hundred years later the communication of indulgences and privileges was again renewed when Pius IX revoked this Bull of Benedict XIV; this was confirmed by a decision of the Congregation of Indulgences which renewed previous communications by declaring that Tertiaries of St. Francis enjoy ‘omnes et singulas indulgentias, privilegia, communicationes, . . . Tertiariis S. Francisci a glorioso Praedecessore suo Benedicto XIII concessas, tam vigore Constitutionis *Paternae Sedis*, die 10 Dec. 1725,²⁷ quam alterius, *Singularis devotio*, die 5 Julii 1726,²⁸ atque ab ipsa Sanctitate Pio IX, tum Tertiariis Franciscalibus Galliarum

²² Benedict XIII, Bull, *Paternae Sedis Apostolicae*, Dec. 10, 1725, § 3 (*Bull. Rom.*, XXII, 286); the context indicates that this had reference to the Third Order *Regular* as well as *Secular*.

²³ Bull, *Sollicitudo Pastoralis officii*, March 13, 1736 (*o. c.*, XXIV, 122 f).

²⁴ Bull, *Romanus Pontifex*, March 12, 1754 (*Bull. Rom. Continuatio*, I, 353 f).

²⁵ Cf. the decision of the S. C. of Indulgences, Feb. 5, 1735 (*Decreta Authentica S. C. Indulg.*, n. 107) which is mentioned by Benedict XIV in § 2 as being given Feb. 5, 1736.

²⁶ Bull, *Ad Romanum Pontificem*, March 15, 1751 (*Bull. Rom. Continuatio*, III, 257-260).

²⁷ *Bull. Rom.*, XXII, 285-294.

²⁸ *O. c.*, 370-373.

per litteras Apostolicas in forma Brevis, *Supremi Apostolatus*, die 7 Julii 1848 confirmatas, tum per alias litteras, *Cum sicut nobis nuper*, die 11 Martii 1851 ad preces Rmi P. M. Generalis Ord. Conventualium S. Francisci concessas, . . . Non obstantibus Constitutione Benedicti XIV anni 1751, quae incipit *Ad Romanum Pontificem* . . .”²⁰

When Leo XIII in 1883 drew up a new Rule for the Franciscan Third Order Secular, he abolished all previous indulgences and privileges, and instead granted a new list.²¹ Nevertheless Pius X saw fit to grant the intercommunication of *indulgences* between the Tertiaries, and the First and Second Order.²²

In order to gain the indulgences of the Third Order it was considered necessary to wear the full habit,²³ although after 1703, the scapular with cincture was considered as a *parvum habitum* and was allowed to be conferred as a habit by the Congregation of Bishops and Regulars;²⁴ this decision was later approved by the same Congregation when it declared that the habit of the Third Order meant not only the entire garment (*vestem totalem*) but also the scapular and cord.²⁵

Tertiaries also enjoyed precedence over all confraternities in procession, provided they wore either the small or full

²⁰ Apr. 14, 1856—cf. Antonius de Cipressa, *o. c.*, p. 143 f; Hilarius Parisiensis, *o. c.*, p. 141, n. 2; *Decreta Authentica S. C. Indulg.*, n. 375.

²¹ Const., *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588).

²² Brief, *Sodalium e Tertio Ordine*, May 5, 1909 (*A. M.*, XVIII, 174-176).

²³ Thus Ferraris, *s. v. Tertiarii*, n. 34, in commenting on the various papal decrees giving authority to the Friars Minor to vest with the habit; cf. also Antonius de Cipressa, *o. c.*, p. 87 f; Hilarius Parisiensis, *o. c.*, p. 142.

²⁴ Ferraris, *l. c.*; Benedict XIII in giving jurisdiction to the Friars Minor Capuchin (Bull., *Ratio Apostolici Ministerii*, June 23, 1726—*Bull. Rom.*, XXII, 368, § 2) cites this decision which states that they have jurisdiction to confer the ‘*habitum seu scapulare parvum cum cingulo*.’

²⁵ Antonius de Cipressa, *o. c.*, p. 87.

habit;” they were also privileged to take part in processions with the Friars Minor under the cross of the latter.” Precedence over all lay confraternities in procession was confirmed by the Congregation of Bishops and Regulars, Sept. 20, 1748, and by the Congregation of Rites, May 28, 1886.”

Franciscan Tertiaries were also permitted to use the Franciscan Breviary.”

Due to the great number of changes which had been made in the Rule of Nicholas IV by various papal decrees and dispensations, it was not observed in its full rigor in the nineteenth century. Therefore for the sake of uniformity, and in order to have a complete Rule which could be presented to all Franciscan Tertiaries, Leo XIII in 1883 drew up new regulations and officially confirmed them by their solemn publication in the Constitution, *Misericors Dei Filius*, May 30, 1883. This Rule is the norm by which all the Franciscan Secular Tertiaries are now guided, no matter under what jurisdiction they may be.”

§ 2. Tendency toward the Religious Life.

Already in the thirteenth century there was a tendency among some of the Tertiaries to unite in community life, not at first with any vows of religion, but for the particular purpose of striving after greater perfection, by being segregated from the snares of the world. The first notable example seems to have occurred in Germany, where many of the Brothers and Sisters of penance led a community life in

” Benedict XIII, July 22, 1728 (Antonius de Cipressa, *l. c.*; Ferraris, *l. c.*).

” Benedict XIII, Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725, § 9 (*Bull. Rom.*, XXII, 290).

” *Decreta Authentica S. C. R.*, n. 3664.

” S. C. of Rites, Aug. 30, 1687 (Ferraris, *s. v. Officium*, Art. III, n. 56.

” The Constitution and the Rule may be found in the *Fontes*, n. 588; the Rule is also given below in the appendix to this dissertation.

separate houses; Pope Boniface VIII allowed them to have their own chapel.¹²

Again in many other places, communities of workingmen joined the Third Order in order to acquire a legal status and to partake in the spiritual privileges. Thus in 1289 many groups of Beghard weavers in the Netherlands adopted the Rule of the Third Order and later organized a federation of communities. In 1346 delegates from seventeen houses of the Beghards passed a resolution that none but Tertiaries be admitted to membership in their weaving organization.¹³

These did not at first take the vows of religion, but remained *Secular* Tertiaries, with the simple promise of obedience to their minister for the purposes of good government; they also remained single. It was but natural that this should have led to the religious life, and this is particularly noticeable toward the close of the fourteenth century, when the solemn vows of obedience with regular habit and cloister were added to the Rule of Nicholas IV by Boniface IX and others.¹⁴

The first group of Tertiary nuns was founded at Foligno in 1397. Boniface IX and Martin V allowed other convents of the Third Order to be founded, subject to the government of a Superior-General (a nun).¹⁵

¹² Bull, *Cupientes cultum*, July 11, 1295 (*Bull. Franc. Epitome*, n. 2027, p. 204).

¹³ Callaey, *The Third Order of St. Francis*, p. 57.

¹⁴ Wadding, *Annales Minorum*, IX, ad an. 1397, n. 31, p. 444; X, ad an. 1435, n. 18, p. 238 f; cf. *ibidem*, ad an. 1377, n. 3, p. 2.

¹⁵ Callaey, *o. c.*, p. 58 f; Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 51; Jacobili, *Vita della B. Angelina*, Bologna, 1659; *Orbis Seraphicus*, II, 837-922, particularly p. 842; Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 1 (*Bull. Rom.*, XXII, 296): " * * * Ordo, pro utriusque sexus christifidelibus in ipso saeculo et in conjugio propriisque domibus manentibus a beato Francisco institutus, nonnisi quartodecimo labente saeculo in Italia praesertim ad statum religionis fuerit evectus * * *"; cf. *Etudes Franciscaines*, XXV, p. 296.

Congregations also sprang up in Belgium and the Netherlands, whose members lived a community life; Boniface IX allowed them the solemn vows of chastity and obedience and gave them authority to hold Chapters for the election of their Superiors; clerics could possess benefices with the permission of their Superiors, '*cum Regula dicti Tertii Ordinis abdicationem proprietatis non contineat.*'⁸⁸ John XXII confirmed the statutes of the Belgian Congregations and added the solemn vow of chastity;⁸⁹ he also defended these Tertiaries against the civil magistrates by declaring them to be ecclesiastical persons with the favor of all privileges and ecclesiastical immunities 'enjoyed by other Religious and ecclesiastical persons.'⁹⁰

Other Congregations arose in the same manner in parts of France, whose members had visitors according to the Rule of Nicholas IV and lived under the immediate direction of a local Superior; John XXII counseled that these visitors should be selected from the Friars Minor; in 1447 they were given permission to hold a General Chapter by Nicholas V—they availed themselves of this privilege the following year and elected a Vicar-General.⁹¹

These congregations naturally spread and had a diversity of Rules, especially regarding enclosure. To remove this difference in the Rule of the various communities of men and women, and to give them the three solemn vows of poverty, chastity, and obedience with the obligation of enclosure, together with all the consequent privileges accorded to Religious, Leo X, in 1521, solemnly approved this branch of

⁸⁸ Hilarius Parisiensis, *o. c.*, p. 56; Boniface IX, Bull, *His quae divini*, Jan. 18, 1401 (Wadding, *Annales Minorum*, IX, n. 44, p. 462 f).

⁸⁹ Bull, *Personae vacantes*, Oct. 26, 1413 (*Bull. Franc.*, VII, n. 1308, p. 471-473).

⁹⁰ Bull, *Pastoralis officii cura*, March 31, 1414 (*o. c.*, n. 1315, p. 475 f); cf. also, *ibidem*, n. 1316.

⁹¹ Hilarius Parisiensis, *o. c.*, p. 57.

the Third Order under the title '*Third Order Regular*'; he also gave them a uniform set of Rules.²²

The present treatise has attempted to give only a short sketch of the development of this institution, and therefore no latitude has been given to the various branches of diocesan Sisterhoods and Congregations of men which have risen in recent years and developed from this institution.

²² Bull, *Inter Caetera*, Jan. 20, 1521 (*Seraphicae Legislationis Textus Originales*, 287-297); its modern approval and Rule according to present Canon Law was given in the Constitution, *Rerum condicio*, of Pius XI, Oct. 4, 1927 (*A. A. S.*, XIX [1927], 361-367; *Commentarium O. F. M. Conv.*, an. XXIV, 309-315).

PART II.

**PRESENT CANONICAL
LEGISLATION**

PART II

PRESENT CANONICAL LEGISLATION ON THE THIRD ORDER SECULAR OF ST. FRANCIS

CHAPTER VI

Definition and Purpose of the Third Order Secular of St. Francis.

ARTICLE I.

Definition.

Some idea of the elements of a Third Order Secular has already been gained from the narration of its historical as well as canonical development. The fundamental idea of all lay associations in any way approximating the subject of this treatise has always been the desire to preserve some manner of connection with a religious Order. The Church is highly desirous that lay people become members of associations which have been approved by legitimate ecclesiastical authority,¹ and divides them into Third Order Secular, confraternities and pious unions.²

Canon law does not give a definition of the Third Order Secular as such, but rather limits itself to a description of its members in the following manner: "Tertiarii saeculares

¹ Can. 684.

² Can. 700.

sunt qui in saeculo, sub moderatione alicujus Ordinis, secundum ejusdem spiritum, ad christianam perfectionem contendere nituntur, modo saeculari vitae consentaneo, secundum regulas ab Apostolica Sede pro ipsis approbatas.”*

The Third Order Secular of St. Francis is essentially an ecclesiastical society: otherwise it could not have the approval of legitimate ecclesiastical authority.⁴ It is an association in a rather wide sense of that term, for it cannot be called such because of the fact that its members constitute one body canonically grouped under one head, for this is lacking in the Franciscan Third Order; rather it is an association because Franciscan Tertiaries are joined together by the bond of one and the same Rule for all: by the bond of tending in the same spirit toward a definite end—perfect Christian charity.⁵

For the same reason, the Franciscan Third Order Secular must be called an ecclesiastical society, for it has always been approved by the Holy See; but on the other hand it cannot be called a moral person. Is the Third Order Secular *as an Order* erected by the Church, or rather merely *approved* by it? If the former is true then it possesses one of the essential requisites of a moral person; if not, then it cannot possess that juridical quality.⁶ The Code itself in-

* Can. 702, § 1.

⁴ “Nulla in Ecclesia recognoscitur associatio quae legitima auctoritate ecclesiastica erecta vel saltem approbata non fuerit.” (Can. 686, § 1.)

⁵ Thus Pius X, in his Apostolic Letter, *Septimo jam pleno*, Oct. 4, 1909 (A. A. S., I [1909], 725-738), IX although *ratione nominis* forbids calling the Tertiaries *Leonine Union*, *Conventual*, or *Capuchin* for the reason that all are *Franciscan Tertiaries*, nevertheless distinguishes between these three *ratione jurisdictionis*, when he states that all have the same privileges no matter to which Franciscan Family they are subject.

⁶ “Ad normam can. 100, tunc tantum fidelium associationes juridicam in Ecclesia personam acquirunt, cum a legitimo Superiore ecclesiastico formale obtinuerint erectionis decretum.” (Can. 687.)

sinuates that Third Orders are merely approved when it states that Tertiaries live 'according to Rules approved by the Holy See,' and omits any mention of erection, while in speaking of confraternities formal erection is positively demanded.* Canons 687 and 703 § 1 also distinguish between approbation, aggregation, and erection. Benedict XIII, in his approval of the Franciscan Third Order Secular mentions nothing of erection, but uses the simple words, 'ab hac Romana Sede approbata.'" Nowhere in the various papal approbations which the Third Order has received has there been any mention of *erection*, but rather only of *approval*.

Besides, according to canon 100 § 3, collegiate moral persons are to be considered as minors and therefore must act through some individual. But *ratione jurisdictionis* (and this is the basic element of this question) Tertiaries are distinct according as they are subject to the Friars Minor Leonine, Conventual, and Capuchin (also Third Order Regular) as stated above by Pius IX: in fact this juridical separation has frequently been emphasized by the Holy See, so much so that a Tertiary Sodality erected, e. g. by the Friars Minor *Capuchin*, cannot be subjected to the jurisdiction, e. g. of the Friars Minor *Conventual*, without the express consent of the former, even though they (the former) have vacated the territory wherein the Sodality was erected." Canon 705 also affirms this separation of jurisdiction so that a Tertiary belonging to a Sodality e. g. under the Leonine jurisdiction, cannot at the same time belong to another Sodality e. g. under the Capuchin jurisdiction; by changing from one

* Can. 702, § 1.

* Can. 708.

* Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 3 (*Bull. Rom.*, XXII, 287).

* *S. C. of Religious*, Dec. 6, 1911 (*A. A. S.*, II [1912], 143).

to the other he loses membership in the Sodality he has left: therefore he also loses his juridical rights.

Since then the bond which unites these Tertiaries who are under the various jurisdictions is fraternal, rather than juridical, it is evident that this essential quality of juridical connection and subjection is lacking in the Franciscan Third Order as a whole. The same argument may be used regarding the election of officials. Granted momentarily that the Third Order as such was legitimately erected, it would have the right to elect its officials:²¹ but this election would be both illogical and impossible, for since Tertiaries under distinct jurisdictions have no juridical connections, it is incompatible with the concept of a moral person that they can unite in such an election when there is no juridical bond between them; hence the Third Order *as such* is not a moral person. The question of the *individual Sodalities* of the Third Order as moral persons will be treated later.

Tertiaries live in the world, that is, their duties as members of a family, whether as husband, wife or child, do not interfere with their obligations as members of the Third Order. This was the express purpose of Francis in founding the Order, for he realized that the religious life which a great majority of his time wished to embrace, was incompatible with the concept of family life.²²

Again canon 702 § 1 states that the Third Order Secular is to be under the care of a religious Order; in this the wisdom of the legislator can be seen, for immediately the same canon adds that Tertiaries are to live according to the spirit of this same religious Order. Therefore Tertiaries live in the world, but at the same time they should live up to the ideals of the Franciscan religious in so far as their

²¹ Can. 697, § 1.

²² Cf. above Chap. V, Article I on the foundation of the Third Order.

state of life permits. In glancing over the Rules of the Third Order Secular of St. Francis, a great similarity can readily be noticed between the ideals of the Franciscan religious and the Franciscan Tertiaries, especially concerning poverty, simplicity of life and the practice of Christian charity.

In order to understand more clearly the notion of the Third Order Secular of St. Francis, it might be well to compare it with other associations:

A) Although both bear the name '*Order*', yet there is a great difference between the Third Order Regular and Secular, for the former, although an offshoot of the latter, live in community life with the vows of religion,²³ while the members of the latter live in the world with their families. The same distinction may be drawn between the three Families of the First Order (Friars Minor Leonine, Conventual and Capuchin), and the Third Order Secular. A comparison of canons 487 and 488, 2o, which speak of the religious state and its members with solemn vows, with canon 702 § 1 brings out this difference more clearly. But even with this great dissimilarity, the Third Order Secular of St. Francis always was and remains a true Order: Benedict XIII especially remonstrated against those who would reduce it to a mere confraternity, when he declared it to be a 'true and proper order, composed of seculars . . . and altogether distinct from any confraternity, for it possesses a Rule approved by the Holy See, with a novitiate, habit and profession, of a specific form, even as Regulars.'²⁴

²³ Cf. above, Chapter V, Art. IV, § 2.

²⁴ " * * nos eundem sanctum, meritorium et christianae perfectioni conformem, necnon verum et proprium ordinem, unum in toto orbe ex saecularibus aliisque collegialiter viventibus et regularibus promiscue compositum, [these latter words have reference to the Third Order Regular, for Benedict XIII is speaking of both in this Bull] et a confraternitate quacumque ex comprehensis in Bulla recolendae

The same declaration was made by Leo XIII in an audience granted to the Ministers-General of the First Order and the Third Order Regular,²⁶ and by Benedict XV who expressly stated that 'Francis founded a true Order of Tertiaries.'²⁷ Consequently there is a great similarity between the Franciscan Religious Orders and the Third Order Regular, for both are true Orders with novitiate, habit and profession, and although the Third Order Secular of St. Francis 'is not bound as the other two [the First Order and the Third Order Regular] by the vows of religion, it is the same as regards simplicity of life and the practice of penance.'²⁸

Then again both live according to Rules approved by the Holy See, and through these aspire to perfection; the Franciscan Religious as well as the Tertiaries are bound by the ties of brotherly love—the former by their common life, the latter by their mutual help toward one another in health, in sickness and in death.²⁹

B) The Third Order Secular of St. Francis differs from other associations of the laity: Benedict XIII and Leo XIII as noted above have expressly discriminated between the Franciscan Third Order Secular and other lay associations.

memoriae Clementis Papae VIII omninodè distinctum, utpote qui sub propria regula ab hac Romana Sede approbata, cum novitatu, professione et habitu, sub certis modo et forma, prout caeteri Ordines tum regulares tum militares et alii hujusmodi consueverunt, dispositus reperitur, fuisse semper et esse decernimus et declaramus."—Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 4 (*Bull. Rom.*, XXII, 285-294).

²⁶ July 7, 1883: "Aliqui existimarunt, post recentem Constitutionem *Misericors Dei Filius*, Tertium Ordinem ad simplicem Confraternitatem et Sodalitium esse revocatum. [Talis non est nostra mens, sed uti declaravimus [in the Constitution, *Misericors Dei Filius*, May 30, 1883—*Fontes*, n. 588], ejusdem instituti natura ac essentia perseverant, et non simplex congregatio, sed verus Ordo remanet." (*A. M.*, II, 111.)

²⁷ Const. *Sacra propediem*, Jan. 6, 1921 (*A. A. S.*, XIII [1921], 34).

²⁸ *Ibidem*.

²⁹ Cf. Rule of Leo XIII, II, §§ 9, 13-14.

Although even the Holy See at times uses the words 'fraternity', 'confraternity' and 'sodality' to designate the Third Order Secular, this term is not used in the canonical sense, but rather in a popular sense to denote that Franciscan Tertiaries are joined into a fraternity by the common bond of their Rule; in this same sense even the Regular Orders are called fraternities: thus the words 'frater' and 'fratres' are used to designate the members of a Regular Religious Order.

The Franciscan Third Order differs from other associations of the laity by reason of its approbation: it has always been approved by the Holy See itself, while the ordinary of the place may approve other associations.¹⁰ The same distinction can be drawn regarding the approbation of their respective Rules and Statutes according to canons 689 and 702 § 1. There is also a great contrast *ratione jurisdictionis*: the Third Order is under the jurisdiction of the Friars Minor, *seclusis locorum ordinariis*,¹¹ while other associations, unless they have a privilege such as the Franciscan Third Order Secular enjoys, are under the jurisdiction of the ordinary of the place.¹²

Membership in this institution is a state of life which in itself tends to perfection: other associations as a rule have some *particular* virtue or end in view.¹³

The Third Order Secular also differs from other associations of the laity by reason of its membership: thus religious with either temporary or perpetual vows are forbidden

¹⁰ Can. 686, § 2.

¹¹ Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725—cf. above pp. 42-45.

¹² Can. 690, § 1.

¹³ Compare canon 702 with canon 707. "Tertius Ordo est multo plus quam quaedam confraternitas; est enim status vitae tendens vi status istius ad perfectionem christianam." (Prümmer, *Manuale Juris Canonici*, Q. 270.)

to become members of this association," while there seems to be nothing in canon law forbidding religious as such from becoming members of confraternities and pious unions;" neither are Tertiaries allowed to belong to two different Third Orders at the same time," although such an exclusion is not made by the Code in regard to other lay associations.

Secular Tertiaries are not ecclesiastical persons in the canonical sense of that term;" nevertheless in a wide sense they may be called such: 1) Because they are connected with a religious Order which has the approbation of the Holy See; 2) for the reason that this same Holy See has also approved the Order of Tertiaries; 3) because they observe a Rule which in many ways partakes of the religious state.

Tertiaries also differ vastly from Cord-bearers (*Confraternitas Chordigerorum*) in:

1) Institution—The Third Order Secular was founded by St. Francis; the Confraternity of Cord-bearers by Sixtus V.

2) Nature—the one is an Order; the other a simple confraternity.

3) Rules—the Rules of the Third Order Secular are approved by the Holy See; those of the Cord-bearers by the ordinary of the place.

4) Habit—Tertiaries wear a cord and habit, or a scapular in place of the latter; Cord-bearers, as the name implies, wear only a cord."

" Can. 704, §1.

" Cf. canons 707-726.

" Can. 705.

" Formerly they had all the privileges of ecclesiastical persons—cf. above Chap. V, Art. III.

" Mocchegiani, *Collectio Indulgentiarum*, n. 1532; Mocchegiani, *Jurisprudentia Ecclesiastica*, II, n. 679.

ARTICLE II

Purpose of the Third Order Secular
of St. Francis.

The purpose of the Third Order Secular is very concisely summarized in canon 702 which states that Tertiaries live in the world under the care of the [Franciscan] Order and according to its spirit, in conformity with their lives as laity. The primary end of the Third Order was the same in the beginning as it is now: to offer to its members a Rule of life which is more conducive to christian perfection than the means ordinary christians have at their disposal. The Tertiaries, besides those norms which are common to the laity in general, have special Rules and precepts which tend to a more christian perfection, although they do not bind under sin.¹

An understanding of the purpose of the Franciscan Third Order could best be arrived at by determining the primary object of its foundation by St. Francis, by ascertaining the incentive which the laity of his time had in becoming members of such an organization, for as Leo XIII and other pontiffs have stated, the nature of the Third Order remains the same as it was in the beginning.² Therefore looking into the primary object which induced the foundation of the Franciscan Third Order Secular, history relates that the

¹ Thus the first Rule of the Order: "In supradictis omnibus [Regulis] nemo obligatur ad culpam, sed ad poenam * * *" (XII, 7); "In his legibus si qui forte quid deliquerint, hoc se nomine culpam suscepturos nullam sciant * * *" (*Rule of Leo XIII*, III, § 5).

² Leo XIII, Const. *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588); the words of the same pontiff in an audience granted to the Ministers-General of the First Order and the Third Order Regular, July 7, 1883: " * * * ejusdem natura ac essentia perseverant, * * *" (A. M., II, 111); Benedict XIII, Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725, § 4 (*Bull. Rom.*, XXII, 285-294).

Saint wished to give the laity, upon their own plea, a Rule of life which was near to the evangelical precepts, and closely approximated the religious life, and still did not destroy family life, and their necessary environment in, and their contact with the world as seculars and laity.⁵ This principle is very clearly embodied in the definition of Tertiaries as contained in canon 702 § 1, as well as in recent papal pronouncements. Thus Leo XIII in describing the foundation of the Third Order, states that 'with a wonderful simplicity and perseverance, St. Francis began to hold up to a decadent world, in word and in deed, the true ideal of christian perfection, . . . leading it back from a long aberration to the imitation of Christ.'⁶

Again in the solemn approval of the mitigated Rule of the Third Order of St. Francis, the same pontiff declares that the 'Third Order of St. Francis is based entirely on the observance of the precepts of Jesus Christ. The Holy Founder had no other object in view than that the Order should be a kind of training school for a more intensive practice of the christian Rule of life.'⁷ Franciscan Tertiaries should especially tend to christian perfection by the simplicity of their lives,⁸ and especially are they to practice Christian charity toward their brethren both in life⁹ and in death.¹⁰

⁵ Cf. above chap. V, Art. I; Leo XIII, Encyclical, *Auspicato*, Sept. 17, 1882 (*A. S. S.*, XV, 149 f).

⁶ Encyclical, *Auspicato* (o. c., 147).

⁷ Const., *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588).

⁸ *Rule of Leo XIII*, II, § 1: "Sodales Tertii Ordinis in omni cultu habituque, sumptuosiore elegantia posthabita, teneant eam, quae singulos deceat, mediocritatis regulam."

⁹ *O. c.*, II, § 9: "Caritatem benevolam et inter se et ad alienos sedulo tueantur."

¹⁰ *O. c.*, II, § 14: "Ad exsequias sodalis demortui sodales municipes hospitesve convenient, simulque * * * preces * * * ad coeleste demortui

Especially should they take care that books of a tainted character are not read, and in order to hold to the traditions of their faith, the Sacrifice of the Mass should be attended frequently in their parish church; as a means of preserving the faith in themselves and in others, they should not hesitate to assist in the instruction of the young regarding christian doctrine. There is no doubt that the greatest means of acquiring this christian sanctity is through its practical application: by the avoidance of discordance, by the care of the sick through alms; in one word: works of mercy cannot be encouraged too strenuously.* And if the Tertiaries are equipped to aid the needy in their manifold wants, they shall be no less charitable in assisting those who are in need of those things which are above the material: this especially by means of a good example, so that 'our Franciscan Tertiaries by purity of faith, by innocence of life, and by cheerful zeal, shall diffuse far and wide the good odor of Christ, and be to the brethren that have gone astray both a reminder and an invitation to come to a sense of their duties. This the Church asks, this she expects of them.'"

Pius X especially concerned himself with explicitly defining the purpose and scope of the Third Order Secular of St. Francis. There is no doubt that in many localities the true purpose of this Order: the acquirement of christian perfec-

solatium adhibeant. Item sacerdotes inter rem divinam, laici, si poterunt, sumpta Eucharistia, pacem fratri defuncto sempiternam pii volentes adprecentur."

* Pius X, Const., *Tertium Franciscaliū Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 584).

" Benedict XV, Const., *Sacra propediem*, Jan. 6, 1921 (A. A. S., XIII [1921], 39 f).

tion by adhering as closely as possible to the evangelical precepts, by assistance to others in both material and spiritual matters, had been greatly distorted; hence 'we shall not conceal a fear produced in Us for some time by certain symptoms that an unwise zeal for modernity, on the plea of being of greater service to society, is insinuating itself in some places in the Order of Tertiaries, and gradually turning it aside from its original scope as conceived by the most holy Francis.'

The pontiff goes on to explain that the scope of the Third Order today is the same as in the time of its founder, and as has been handed down through the various Apostolic Constitutions.

'Therefore from what has been said, it is Our opinion that the institute of the Third Order consists in this: that its members make use of the evangelical precepts in their daily lives, and hold up to others this example of a christian life. Consequently Third Order Sodalities as such (*qua talia*) should by no means be concerned with civil and merely economical dealings; if they do this they therefore realize that they are deviating from the purpose of this institute and are operating against our will.'¹¹

On the contrary it is highly praiseworthy that Tertiaries as individuals, become members of Catholic societies which have a peculiar end in view; neither are they prohibited from doing social work (*actione sociali*) such as has been approved by the Holy See; but the Third Order as such, is especially prohibited from invading the realms of society or to make such a purpose its own."¹²

From the preceding part of his Constitution it is evident

¹¹ Pius X, Const., *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (A. S., IV [1912], 582-585).

¹² *Ibidem*.

that Pius X had in mind the works of mercy, and the instruction of the ignorant and the young in christian doctrine when he referred to 'social work'. This is also evident from a decree of the Sacred Consistorial Congregation, which under the heading 'De Operibus piis et socialibus', describes social work as the provision for the moral and religious end of the faithful, as well as the provision for their temporal needs by works of mercy.²² But if a Tertiary should found a new society for either a pious or charitable purpose, even though the Franciscan Superiors may be called the authors of it in a wide sense, it is nevertheless entirely under the jurisdiction of the bishop.²³

The reason for this is apparent, for the Third Order Secular has not an individual purpose in view such as most confraternities and pious associations; it has rather a more general and higher purpose of christian perfection, which may indeed be, and is acquired through works of charity and other pious causes, but at the same time it is forbidden that any of these works be made the principal end and purpose of the Third Order.

Neither can it be objected that the oft-quoted words of Leo XIII—'*my social reform is the Third Order*'—are opposed to those of Pius X who prohibits the Third Order as such from engaging itself too freely in economic and social affairs. A perusal of all the pronouncements of Leo XIII on the Third Order will cause such an objection to vanish, for he stresses the spiritual and religious side of the Third Order just as strenuously, and perhaps even more so than the later pontiff.²⁴ By social reform Leo XIII does not mean

²² Dec. 31, 1909, n. 143 (A. A. S., II [1910], 33).

²³ Pius X, Const. *Tertium Franciscalum Ordinem*, l. c.

²⁴ Cf. passim the collection of the various decrees of Leo XIII on the Third Order—Fleming, *Leonis XIII Acta ad III Ordinem Spectantia*.

to insinuate that the Tertiaries are to engage *as an Order* in those activities which Pius X prohibits them to embrace in the same manner, but he does state, and the conclusion is logical, that if the Rule and the precepts of the Third Order are followed everywhere, the social aspect of the world will be changed for the better, that the lives of the people will be reformed, because of the fact that the observance of these rules necessarily is conducive toward christian charity and perfection.

Thus Leo XIII, speaking of the early times of the Third Order states that it 'formed a solid bulwark of public safety. Keeping in view the virtues and precepts of their founder, the members did their utmost to resuscitate in society the glorious fruits of christian morality. The fact is, by their influence and example, they often tore down or modified feuds; they snatched weapons from the hands of infuriated partisans; they removed the source of strife and contention; they brought relief to the needy and desolate; they chastised luxury, that ravener of fortunes and pander to vices. Domestic peace and public tranquility, integrity of life and kindness, the right use and management of property—the best foundations of civilization and security—spring from the Third Order as from their root, and it is to Francis that Europe is largely indebted for the preservation of these blessings.'¹²

After describing the distressing conditions of society, the pontiff continues that 'no small hope of relief could be placed in the rule of Francis, were it restored to its former importance. With it would flourish faith and piety and all that is glorious in Christianity; the lawless craving for earth's perishable goods would be broken and, what is frequently regarded as the greatest and most hateful of bur-

¹² Encyclical, *Auspicato*, Sept. 17, 1882 (*A. S. S.*, XV, 150).

dens, people would no longer dread to put the bridle of virtue on their passions. . . . Furthermore, once men are thoroughly imbued with the Christian religion, they feel the conviction that it is a matter of conscience to obey lawfully constituted authority, and that no one may be molested in any of his rights.'"

Innumerable other examples could be given to prove that the one purpose of the Third Order as described by recent pontiffs is that of the acquirement of christian perfection by its members, and through their consequent good example, the reform of others in like manner. Consequently the basic purpose of the Third Order as well as the other Franciscan institutions is the same today as it was in the time of St. Francis, and as has been more recently expressed by pontiffs in their pronouncements on the Third Order: "The entire Franciscan Institute is based on the observance of the precepts of Jesus Christ,"" which observance, as Francis has inculcated it, cannot fail to assist in uprooting some of the modern errors of Socialism and Naturalism."

It might be added here that the high purpose and deep influence of the Third Order Secular of St. Francis has recently become so pronounced that it has not failed to attract attention even in Non-Catholic circles, with the result that such an institute has been founded in Protestant Churches."

"O. c., 151 f.

"Leo XIII, Const., *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588); Pius X, Const., *Tertium Franciscanum Ordinem*, o. c., 582 f.

"Leo XIII, Encyclical, *Auspicato*, l. c.

"Cf. "Der III Orden in Protestantischer Aufmachung", *St. Franziskus*, July, 1927, nn. 1-2, pp. 13-18, where a summary of the Rules of the Third Order as embodied in Protestant sects is given.

CHAPTER VII

General Jurisdiction Over the Third Order Secular of St. Francis.

ARTICLE I.

The Roman Pontiff.

The divine institution of the Church as well as the very nature of law and order demands that at the head of all its members there should be a supreme rule subject to no one.¹ Since the Third Order Secular of St. Francis is a legitimately approved and recognized society in the Church, it follows that it has as its head the Roman Pontiff, not only by reason of the fact that its members are in communion with the Holy See, but also because it is an association with Apostolic approbation. But besides the common ties by which all ecclesiastical bodies are subject to the Pope, there are special bonds which unite the Third Order Secular of Francis under the jurisdiction of the Holy Father.

In the first place he reserves to himself the approval of the Rules of the Third Order Secular.² This is not a recent innovation for the Roman Pontiffs, from the very beginning of the Franciscan Third Order, have approved its Rules, made statutes accommodating the lives of the Tertiaries to the trend of the times, and have heartily voiced their ap-

¹ Can. 218.

² "Tertiarii saeculares * * * in saeculo * * * nituntur * * * secundum regulas ab Apostolica Sede pro ipsis approbatas." (Can. 702, § 1.)

proval of the institute as a means of saving souls. Thus Honorius III and Gregory IX gave implicit approbation to the Order when they conceded many privileges to the Tertiaries and recommended them (the Tertiaries) to the bishops of Italy;³ it received its solemn approbation and uniform Rule at the hands of Nicholas IV in 1289,⁴ from which time down to the present those who have occupied the See of Peter have been most profuse in their favorable pronouncements on the Order. No religious institute is allowed to found a Third Order Secular, although such a privilege has been granted to some in the past,⁵ which is precisely the case of the Franciscan Third Order Secular due to its solemn approval and recommendation to the jurisdiction of the Friars Minor, among the noteworthy of which is the Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725.⁶ Hence the foundation of a Third Order Secular may be termed one of the '*causae majores*' reserved to the Roman Pontiff.⁷

The more recent manifestation of papal interest in this Order was shown by Leo XIII when he solemnly approved the institute and issued a new Rule for its members through its publication in the Constitution, *Misericors Dei Filius*, May 30, 1883.⁸ The great number of privileges and indulgences which the Order has always received at the hands of the Holy See could also be adduced as a further mark of

³ Honorius III, Bull, *Significatum est nobis*, Dec. 16, 1221 (*Bull. France.*, I, n. 8, p. 9); Gregory IX, Bulls, *Nimis patenter*, June 25, 1227 (*o. c.*, n. 7, p. 30 f), and *Detestanda*, March 30, 1228 (*o. c.*, n. 20, p. 39 f).

⁴ Bull, *Supra montem* (*o. c.*, IV, pp. 94-97).

⁵ Can. 703, § 1.

⁶ Bull. Rom., XXII, 285-294.

⁷ Can. 220.

⁸ *Fontes*, n. 588.

interest from the occupants of the See of Peter.*

All Tertiaries must manifest their obedience to the Holy See when in their profession they promise to obey the Rules of the Third Order as approved by Leo XIII and Nicholas IV.¹⁰

All the recent declarations of the Popes regarding their solicitude for the spread of the Third Order as a world power for good are always expressive of the fidelity of St. Francis toward the Holy See, and exhort his followers to imitate his example.¹¹ Since devotion to the Holy See is one of the chief Franciscan characteristics, Pius X especially exhorts Tertiaries to pledge their loyalty and fidelity at conventions of the Third Order.¹²

The affairs of Tertiaries are generally not treated by the Roman Pontiff himself, but are reserved by him to the '*Congregatio negotiis religiosorum sodalium praeposita*', which treats exclusively of the government, discipline, temporal goods and privileges of the Third Order Secular.¹³ However, this Congregation does not handle the affairs of Tertiaries as individuals, but rather as members of a society which they

* Cf. passim above chap. V, Art. III-IV.

¹⁰ *Ceremonial of the Third Order*, Art. III.

¹¹ E. g. Leo XIII, Encyclical, *Auspicato*, Sept. 17, 1882 (A. S. S., XV, 145-153); Pius X, Brief, *Sodalium e Tertio Ordine*, May 5, 1909 (A. M., II, 174-176); Pius X, Const., *Tertium Franciscalum Ordinem*, Sept. 7, 1912 (A. A. S., IV [1912], 582-586); Benedict XV, Const., *Sacra propediem*, Jan. 6, 1921 (A. A. S., XIII [1921], 33-41); Pius XI, Const., *Rite expiatis*, Apr. 30, 1926 (A. A. S., XVIII [1926], 153-175).

¹² Const., *Tertium Franciscalum Ordinem*, o. c., n. X: "Cum Franciscalis Ordo id habet velut proprium ac singulare ut Jesu Christi Vicario arctissime adhaereat, Tertiarii suae in Romanum Pontificem ac secundo in Ordinis generales Ministros studiosae observantiae significationem, coetum ineuntes, solemniter edere ne omitant."

¹³ Can. 251, § 1; Pius X, Const., *Sapienti Consilio*, Jan. 29, 1908, I, 5°, 1 (A. A. S., I [1909], 9-19).

represent, namely in those things which concern the government, discipline, temporal goods and privileges of the Third Order Secular as an Order.¹⁴

ARTICLE II

General Jurisdiction of the Friars Minor and the Third Order Regular over the Third Order Secular of St. Francis

In a previous article the relations between the Friars Minor as well as the Third Order Regular, and the secular Franciscan Tertiaries was dwelt on with some detail.¹ The present article shall deal with their canonical authority over the Tertiaries. From the time of the foundation of the Third Order till its definite and solemn approbation by Nicholas IV in 1289, this jurisdiction went through various stages whereupon this pontiff in the Bull, *Supra Montem*, (1289) counseled (consulimus) that the first Order rule the Third.²

The most complete and exclusive canonical subjection of the Secular Tertiaries to the jurisdiction of the Friars Minor occurred at the hands of Benedict XIII through the Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725.³ In this Bull he confirms and approves all former Apostolic pronouncements through which any authority, superiority and preeminence had been granted to the Minister-General and secondary Superiors of the Friars Minor over the Ter-

¹⁴ Cf. Chelodi, *Jus de Personis*, n. 166; Cocchi, *Commentarium*, III, n. 188.

¹ Cf. Chap. 5, Art. II.

² *Bull. Rom.*, IV, 94, chap. 16: "Quia vero praesens vivendi forma institutionem a b. Francisco praelibato suscepit, consulimus, ut visitatores de fratrum Minorum ordine assumantur, * * *".

³ *Bull. Rom.*, XXII, 285-294.

tiaries (§6). Even as the members of the First Order as well as the Second (Poor Clares) recognize Francis as their founder, so also all Tertiaries must recognize the Minister-General and his secondary Superiors, i. e. the provincials and guardians, as their superiors, whom they are obliged to obey in all things pertaining to the Order. As a penalty for disobedience, these same Superiors may eject them from the Third Order with the result that they shall be deprived of all indulgences and privileges.'

After this clear enunciation of the general jurisdiction of the Friars Minor, the pontiff descends to particulars by giving the Minister-General and secondary Superiors authority to erect Tertiary congregations (Sodalities according to the present canonical terminology—can. 702 §2) everywhere 'per patentes Litteras'; these they shall guide with full authority to change anything in the statutes which is not opposed to the Rule and sacred canons.' The Min-

"Mandamus propterea universis et singulis hujusmodi instituti professoribus, per universum mundum existentibus, ac * * * in saeculo sub proprio tectu vel in conjugio ipso * * * degentibus, ut, sicut cum primo et secundo Ordine, Minorum scilicet et Clarissarum, unum et eundem institutorem, auctorem et patriarcham habent, ita unum et eundem ipsiusmet fundatoris legitimum successorem veluti patrem et caput totius seraphici gregis, atque trium Ordinum beati Francisci primum generalem honorent, observent et recognoscant, ejusque secundarios delegatos, sive provinciales, sive guardianos, aut etiam commissarios visitatores, tamquam suos legitimos et veros superiores venerentur, ita ut ipsorum iudicio in dubiis et controversiis circa regulam et statuta se conforment, atque in iis omnibus, quae concernunt Ordinem ipsum, nec regulae sunt contraria, illis pareant et obediant: quod si secus fecerint, ab iisdem cassari atque habitu spoliari possint, immo nullis proinde Tertiariorum gratiis et privilegiis gaudere decernimus et iubemus." (§ 7.)

"* * * quibus propterea plenum jus ac libere auctoritatem ea innovandi, immutandi, augendi aut imminuendi, ac alia de caetero statuendi, quae bonum dicti gregis regimen concernere possunt, dummodo tamen regulae praefatae sacrique canonibus non adversentur, * * * perpetuis futuris temporibus facultatem facimus atque largimur." (§ 8.)

ister-General through his secondary Superiors can receive into the Third Order to the exclusion of all others; in the same manner they have authority to instruct in the Rule, administer the Sacraments, and preside at all elections and functions of the Sodalities. (§8)

But even this is not the full extent of the jurisdiction of the Friars Minor, for he enjoins them to perform the office of visitation by instructing in the Rule, reforming and correcting the Tertiaries, even to expulsion from the Order; this authority of visitation also extends to vigilance over Tertiary funds; but the most important canonical point of this Bull is that the ordinary of the place is positively excluded from any of this jurisdiction.*

This Bull, although given in favor of the Friars Minor *Observant*, has equal force for the other Franciscan Families, due to its extension by the same pontiff to the Friars Minor Capuchin,⁷ Conventual⁸ and Third Order Regular;⁹ the same pontiff again confirmed this extension to the Friars Minor Conventual and Capuchin in 1728.¹⁰

This equality of jurisdiction has always been maintained down to the present time by the Holy See. Thus Clement XII reaffirms the jurisdiction of the Friars Minor Capuchin after a dispute,¹¹ and at the same instigation the Congregation of Bishops and Regulars Sept. 11, 1740 declared that 'all legitimate sons of St. Francis have authority over the Secular Tertiaries as was given by Benedict XIII and

* "privative quoad alios quoscumque"; "seclusis locorum ordinariis et aliis quibuscumque personis cujusve status." (§ 8.)

⁷ Bull, *Ratio Apostolici Ministerii*, June 23, 1726 (*Bull. Rom.*, XXII, 367-370).

⁸ Bull, *Singularis Devotio*, July 5, 1726 (*o. c.*, 370-375).

⁹ Bull, *Exponi nobis*, Sept. 30, 1729 (*o. c.*, 856-858).

¹⁰ Bull, *Dilecti Filii*, June 21, 1728 (*Ferraris*, s. v. *Tertiarii*, n. 29).

¹¹ Bull, *Apostolicæ Servitutis*, July 23, 1735 (*Bull. Rom.*, XXIV, 61 f.).

Clement XII¹²; this decision was implicitly approved when Benedict XIV, treating of the same question, embodied it in the Constitution, *Laudabile*.¹³ The *Rule of Leo XIII* demands that the visitors shall be chosen from the First Order or the Third Order Regular.¹⁴ In an audience granted to the four Ministers-General of the First Order and the Third Order Regular, Leo XIII placed upon them through their priests, the obligation of spreading the Third Order Secular.¹⁵

Pius X in his Brief, *Spetimo jam pleno*, Oct. 4, 1909,¹⁶ not only states the jurisdiction of the Friars Minor over the secular Tertiaries, but insists on the equality of this jurisdiction, whether it be of the Friars Minor Leonine,¹⁷ Conventual or Capuchin, so that the Tertiaries cannot call themselves Leonine, Conventual or Capuchin, but all are rather Franciscan Tertiaries.¹⁸ The omission of any men-

¹² *Bull. Rom.*, Continuatio, I, 548 f.

¹³ Aug. 2, 1745 (*o. c.*, 547-550).

¹⁴ III, §3.

¹⁵ July 7, 1883 (*A. M.*, II, 111; Fleming, *Leonis XIII Acta ad III Ordinem Spectantia*, p. 36).

¹⁶ *A. A. S.*, I [1909], 725-739.

¹⁷ That is, those Franciscans under the various names of '*Observantes, Reformati, Escalceati, Alcanterini, or Recollecti*' whom Leo XIII declared to be under one government by the Constitution, *Felicitate Quaedam*, Oct. 4, 1897 (*A. S. S.*, XXX, 225-233).

¹⁸ To prove these assertions the following points are taken verbatim from the Brief, *Septimo jam pleno*, of Pius X (cited above footnote 16):

IV. "Nomine Capuccinus, Conventualis, Unionis Leonianae Franciscals discriminant non id notando, quod ad rationem ipsam et naturam Fratris Minoris pertinet: hoc enim in Regula Seraphica consistit quae apud omnes Franciscals Ordinis primi una atque eadem est: verum eas designando res quae in hoc genere accidunt naturae; et hae sunt Constitutiones, quae unaquaeque familia proprias et peculiares in observanda, ex Apostolicae Sedis praescripto, sequitur.

VI. Trium familiarum Franciscalium Ministri Generales omnes sunt atque habendi sunt et dignitate et potestate pares, ut Vicarii atque

tion of the Third Order Regular by Pius X by no means excludes them from this jurisdiction, for this Brief treats *ex professo* of the First Order only. The same pontiff reaffirms the jurisdiction of the Friars Minor when he counsels that the Third Order Secular should be instituted in secular churches through legitimate delegation by the Franciscan Superiors, 'salvo semper jure et officio praelatorum Ordinis Primi.' The same argument may be used here regarding the omission of the Third Order Regular, for this epistle was addressed to the First Order.

Having treated of the jurisdiction of the Friars Minor over the Secular Franciscan Tertiaries," the question may be asked: what kind of jurisdiction do they enjoy? The Friars Minor possess *ordinary* jurisdiction over the Tertiaries in *spiritual* matters. This spiritual authority is apparent from the very nature of the institution of the Third Order whose members primarily tend toward Christian perfection. The first authority which was accorded to the Friars Minor was of a *spiritual* nature. Subsequent legislation up to the time of Benedict XIII always concedes

adeo veri successores sancti Francisci, nempe pro sua quisque familia, atque etiam pro sodalibus Secundi et Tertii Ordinis, quotquot suae habent vel jurisdictioni subjectos vel familiae aggregatos: iidem praedecessorum suorum perpetuam seriem ab ipso Patre Seraphico omnes jure ducunt.

IX. Ministro Generales triplicis Minorum familiae pari sunt potestate in Orinem Tertium. Tertiarii propterea qui Ministro Generali unius familiae parent, privilegiis indulgentisque fruuntur, ac qui duobus aliis subjecti sunt. Nec licebit qui Tertio Ordini adscripti sunt eos Tertiarios vel ab Unione Leoniana, vel Conventuales, vel Capucinos, appellare, sed Tertiarios S. Francisci seu Franciscuales, sine alio appposito dici oportebit.

"Epistle, *Tertium Franciscalium Ordinem*, Sept. 7, 1912 (A. A. S., IV [1912], 585).

"For the purposes of this treatise, from now on the term *Friars Minor* shall be considered as comprising also the Third Order Regular unless the context denotes otherwise.

jurisdiction which is of a spiritual character, when the pontiffs enjoin the Franciscan Superiors to vest with the habit, instruct in the Rule, correct delinquencies, and generally perform the office of visitation and correction.^a

Benedict XIII in his Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725 (given above), reaffirms this when he enjoins the Friars Minor to erect Tertiary congregations, instruct in the Rule, invest with the habit, correct infractions of the Rule and demand obedience of the Tertiaries with the penal sanction of ejection from the Order.^a Other pontiffs have also stated the jurisdiction of the Friars Minor to be a spiritual one.^a

Other numerous examples could be given, but suffice it to quote Leo XIII, the author of the present Rule of the Tertiaries, wherein the jurisdiction of the Friars Minor is entirely a spiritual one, embracing also the authority of mitigating the Rule in individual cases. The duties of the Director, or Moderator, as contained in the Ceremonial of the Third Order also possess merely a spiritual quality.

Conclusion: the Friars Minor enjoy ordinary spiritual jurisdiction over Tertiaries as *Tertiaries*, as also regarding the erection of Tertiary Sodalties. It is apparent that a distinction between spiritual and temporal jurisdiction must be made, for if the Friars Minor possessed both, they could also concern themselves with the temporal goods of

^a Cf. above chap. V, Art. II.

^a "Tertii Ordinis congregationes saeculares * * * erigere"; "utriusque sexus christifideles * * * recipere;" (§ 8) "ita ut ipsorum iudicio in dubiis et controversiis circa regulam et statuta se conforment, atque in iis omnibus, quae concernunt Ordinem ipsum, nec regulae sunt contraria, illis pareant et obediant". (§ 7) "visitare ac instruere, et paterne corrigere ac reformare, tam in capite quam in membris, ad cassationem usque mantelli et habitus." (§ 8.)

^a Cf. the various Apostolic Constitutions quoted throughout this present chapter.

Third Order Sodalties. That this jurisdiction is spiritual and *spiritual alone* will be treated subsequently in the question regarding the administration of Tertiary properties. The particular and specific application of this ordinary spiritual jurisdiction which accrues to the Friars Minor will be given throughout this treatise.

CHAPTER VIII

THE PARTICULAR APPLICATION OF THE ORDINARY SPIRITUAL JURISDICTION OF THE FRIARS MINOR

ARTICLE I

The Enactment of Statutes

Jurisdiction over the Third Order Secular also implies the authority of enacting statutes by which the Sodalities of Tertiaries may the better be ruled according to local conditions. Thus Clement VII, in subjecting the Tertiaries of Spain to the Third Order Regular, at the same time affirmed that they could 'enact any statutes * * * and constitutions * * * not contrary to the sacred canons, and which tend to the stricter observance of the Order of Penance [Third Order].'¹ Statutes were then drawn up for two classes of Tertiaries: those living a community life, and for Secular Tertiaries. Paul III approved these for the Tertiaries of Spain, Portugal and India.² Those which had been authorized by Paul III and Clement VII were then compiled into a volume called '*Speculum Perfectionis*'.

¹ Bull, *Ad uberes fructus*, March 10, 1526 (Wadding, *Annales Minorum*, XVI, 593-602; *Orbis Seraphicus*, II, 903-911).

² Bull, *Ad uberes fructus*, July 3, 1547 (Wadding, *o. c.*, XVIII, 435-460).

³ Innocent XI, Bull, *Ecclesiae Catholicae*, June 28, 1686 (*Bull. Rom.*, XIX, 697).

The General Chapter of the First Order held at Rome under the title '*Pro Tertiariis et Chordigeris*', approved of these statutes and inculcated their use for all Tertiaries.* They were then published as accessory to, and as an explanation of, the Rule of Nicholas IV; because of their approval by Innocent XI they are commonly known as the '*Statuta Innocentiana*', of the *Statutes of Innocent XI*.

Consequently when Benedict XIII placed the Franciscan Secular Tertiaries under the jurisdiction of the Friars Minor, he simultaneously confirmed the approbation of his predecessors regarding these statutes, when he himself enjoined their use as a means of guidance for the Tertiaries.† But these '*Statuta Innocentiana*' seem to have fallen into disuse for the reason that, being accessory to the Rule of Nicholas IV, they were supplanted by that of Leo XIII, May 30, 1883. However since the *Ceremonial of the Third Order* approved through the S. C. of Rites June 18, 1883, demands that Tertiaries in their profession promise to observe the Rules of the Order according to the Rules of Leo XIII and Nicholas IV (*Ceremonial*, Art. IV), there is no reason why these statutes cannot be called into force in points of legislation which are not fully covered by the Rule of Leo XIII. Beyond this they have not the force of

* Antonius de Cippessa, *Regula sive Modus vivendi Fratrum de Poenitentia S. Francisci*, p. 41.

† "Injungimus * * * ministro generali * * * ut * * * Tertii Ordinis Congregationes saeculares * * * juxta constitutiones seu statuta a felicis recordationis Paulo III antecessore nostro approbata, vel secundum alia in speculo seraphico contenta atque directorium trium Ordinum inserta, necnon per recolendae memoriae Innocentios Papas XI [*Ecclesiae Catholicae*, June 28, 1686—*Bull. Rom.*, XIX, 690-699], XII [*Debitum pastoralis officii*, May 19, 1694—o. c., XX, 631-648] et XIII [*Ordines et congregationes*, Jan. 13, 1724—*Chronologia hist-leg. Seraphici Ordinis*, III, part. II, 24 f] confirmata, quae etiam praesentium tenore renovamus et approbamus, confovere et moderari curet studeatque." (*Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8—*Bull. Rom.*, XXII, 289).

law for nowhere in recent times are they authoritatively quoted as such. Besides Benedict XIII after enjoining the use of these statutes as quoted above, leaves it to the judgment of the Minister-General and his Chapter as to whether these shall be used or not: he grants them full authority to change anything which is not against the Rule and the sacred canons.* Moreover the General Constitutions of the Friars Minor (Leonine) omit any mention of these statutes and decree that the Tertiary congregations shall be governed according to the norms determined by the '*Definitorium Provinciale*.' Although these Constitutions are approved only for the Friars Minor Leonine, on the other hand due to the fact that the three First Orders and the Third Order Regular, as already stated, and as affirmed by Pius X,[†] have equal power over the Tertiaries, their respective Provincial chapters also possess this authority. Neither can it be objected that Benedict XIII only granted this authority to the General Chapter, for a decree of the S. C. of Bishops and Regulars in 1761 expressly declared that this does not exclude other Superiors of the Order from legislative power in regard to the Third Order Secular.[‡]

"* * * nisi tamen eidem generali ministro et capituli generalis patribus aliud in Domino videbitur expedire: quibus propterea plenum jus ac libere auctoritatem ea innovandi, immutandi, augendi aut imminuendi, ac alia de caetero statuendi quae bonum dicti gregis regimen concernere possunt, dummodo tamen regulae praefatae sacrisque canonibus non adversentur, perpetuis temporibus facimus atque largimur." (§ 8.)

[†] *Regulae et Constitutiones Generales O. F. M.*, n. 686.

[‡] "Ministri Generales triplicis familiae pari sunt potestate in Ordinem Tertium." (Cf. above, p. 96 f).

* "Breve Benedictinum non obstando quominus etiam Superiores Provinciales edere valeant particulares Ordinationes pro sui Tertii Ordinis meliori regimine, dummodo Regulae et Apostolicis Constitutionibus non adversentur."—Jan. 17, 1761 (Stein, *Tertius Ordo Franciscalis*, p. 63

Since then the Provincial Chapter has the authority of enacting particular statutes which are not against the Rule and papal decrees, it is consequent that Tertiaries and Directors are not free to decide whether they shall be observed or not, but rather that they have the force of law.

ARTICLE II

Erection of Franciscan Tertiary Sodalties

§ 1. Definition

Fraternal charity and mutual help toward one another as embodied in the Rule of Leo XIII presupposes a close union and close cooperation of Tertiaries, which is best brought about by grouping the Tertiaries into local associations or corporations. These local organizations, according to canon 702 §2 are called Sodalties: *Si tertius saecularis Ordo in plures associationes dividatur, harum quaelibet legitime constituta dicitur sodalitas tertiariorum.* A Sodality may thus be defined: An association of Tertiaries, legitimately erected according to the Rule, into a moral person organically constituted. It is called an association, for this is the specific term used by the Code to denote a juridically organized group of laity.

A Sodality of the Third Order Secular of St. Francis is

f); Antonius de Cipressa, p 43, in quoting this decree has the words '*Superiores Discalceati*' instead of '*Superiores Provinciales*' as in Stein; however granting the correctness of the decree of Antonius de Cipressa, *o. c.*, this would include the Provincials to say the least, for both authors agree on the word '*Superiores*' which is in the plural and therefore comprehends Superiors other than the Ministers-General, namely the Provincials.

a moral person,¹ for it has the essentials of such a juridical quality: No association is recognized in the Church unless it has been erected or approved by legitimate authority.² Nor does an association become a moral person unless a legitimate ecclesiastical Superior has given it a formal decree of erection.³ But since Religious Superiors cannot validly erect a Sodality of Tertiaries without the consent of the Ordinary of the place,⁴ and this consent, according to can. 686 §3, must be in writing,⁵ it follows that according to can. 100, a Sodality of the Third Order Secular is a moral person.

Besides a Tertiary Sodality possesses the other requisites of a moral collegiate person:⁶ by its very nature it is perpetual,⁷ and it is organically constituted with its director, officials and administrators.⁸

§ 2. Requisite Permission for the Erection of Sodalities

For the valid erection of any association, the permission of the ordinary of the place is required, even though an apostolic privilege to the contrary has been proven; this permission must be in writing under pain of invalidity, unless the

¹ "In Ecclesia, praeter personas physicas, sunt etiam personae morales, publica auctoritate constitutae, quae distinguuntur in personas collegiales et non collegiales." (can. 99) "Catholica Ecclesia et Apostolica Sedes moralis personae rationem habent ex ipsa ordinatione divina; caeterae inferiores personae morales in Ecclesia eam sortiuntur ex speciali competentis Superioris ecclesiastici concessione data per formale decretum ad finem religiosum vel caritativum." (can. 100, § 1).

² Can. 686, § 1.

³ Can. 687; 100, § 1.

⁴ "... Superiores religiosi . . . nequeunt sodalitatem tertiariorum valide erigere sine consensu Ordinarii loci, ad normam can. 686, § 3." (can. 703, § 2.)

⁵ "Licet privilegium cinctum probetur, semper tamen, nisi aliud in ipso privilegio cautum sit, requiritur ad validitatem erectionis consensus Ordinarii loci scripto datus; . . ." (can. 686, § 3).

⁶ Cf. Chelodi, *Jus de Personis*, nn. 97-100.

⁷ Cf. A. S. S., XXVI, 485-498.

⁸ Cf. Ceremonial of the Third Order. These various offices are treated throughout this dissertation.

apostolic privilege provides otherwise.* Canon 703 §2 places Sodalities of the Third Order Secular under this law by demanding that they cannot validly be erected without the permission of the ordinary of the place which must be observed according to can. 686 §3; since the Friars Minor have no privilege stating expressly that the permission of the ordinary of the place need not be in writing, their Sodalities are bound by this law. Therefore in order validly to erect a Sodality of the Franciscan Third Order Secular, the permission of the ordinary of the place must be obtained in writing; this written consent is known as a *formal decree of erection*.⁹

Up to Jan. 31, 1893, this consent was required neither for validity or liceity;¹⁰ on this date the S. C. of Indulgences decreed that the permission of the ordinary of the place was necessarily (*necessario*) required.¹¹ Some authors are of the opinion that this decree rendered the consent of the ordinary of the place only necessary for liceity,¹² while the more prominent canonists who treat this question, consider the decree

* Can. 686, § 3.

* Can. 100, § 1.

¹⁰ In a decision of the S. C. of Bishops and Regulars March 13, 1744, it was stated that in a particular Church the Friars Minor were not (*negative*) allowed to erect Tertiary Congregations without the consent of the ordinary of the place. (*Fontes*, n. 1860 ad VI); but this decision was for a particular place and was withdrawn the following year: "Praevio recessu a decisis, *affirmative*."—*S. C. of Bishops and Regulars*, May 2, 1745 (*Analecta Juris Pontificii*, Sèrie 14 (1875), 844).

¹¹ "Utrum ad erigendam novam Congregationem Tertii Ordinis sive in Ecclesiis Regularium sive non Regularium necessario requiritur consensus Ordinarii loci?" Response: "Affirmative." (*A. S. S.*, XXV, 506-509, ad II.)

¹² Genarri, *Quæstioni Canoniche*, n. 33; Beringer, *die Ablässe*, II, nn. 360 f; Stein, *Tertius Ordo Franciscalis*, p. 39 f; Mocchegiani, *Collectio Indulgentiarum*, nn. 1592 f; Mileta, *Trattato Giuridico sul Terz' Ordine Secolare*, p. 46; Tachy, *Les Tiers Ordres*, n. 37, makes no comment on this decree.

as containing an invalidating clause."²² Arguing from the word '*necessario*' and the weight of authors, the writer is of the opinion that this consent was required for validity; certainly the consent did not need to be in writing for the decree mentions nothing of this.

The necessity of obtaining the consent of the ordinary of the place for the erection of a Third Order Sodality is entirely in keeping with the present canon law which states that when permission to erect a religious house is granted by the ordinary of the place, an association which is proper to that religion may also be erected in that place without further permission of the local ordinary, provided that this association be not an organically constituted body;²⁴ but a Sodality of the Third Order Secular is an organically constituted body with its director and Tertiary officials: therefore the reason for the distinction in regard to the necessity of obtaining the consent of the ordinary of the place for its erection.

The Vicar General without a special delegation, or the Vicar Capitular cannot give permission to erect Third Order Sodalities.²⁵

§ 3. Persons with Jurisdiction to erect and direct Third Order Sodalities

In a previous article it was outlined that the Friars Minor, through the concession of many pontiffs, possess ordinary spiritual jurisdiction over the Franciscan Third Order Secular. The question may be asked: What members of the

²² Piat, *Praelectiones Juris Regularis*, II, Q. 71; Vermeersch, *De Religiosis Institutis et Personis*, I, n. 537; Bondini, *De Privilegio Exemptionis*, p. 73; Prümmer, *Manuale Juris Ecclesiastici*, II, p. 314; Wernz, *Jus Decretalium*, III, 2, n. 718.

²⁴ Can. 686, § 3.

²⁵ Can. 686, § 4.

Order of Friars Minor, or rather, what office must one necessarily possess in that Order, that one automatically enjoys authority to erect and govern Sodalities of the Third Order? The answer, from various papal pronouncements and decrees is that this authority is enjoyed by the Ministers-general anywhere in the world, by the Provincials in their provinces, and by the local Superiors in their territory or district.

Benedict XIII, in completely subjecting the Tertiaries to the authority of the Friars Minor, enjoins the Minister-General to erect congregations everywhere, either through himself or through his commissaries; they have authority of investing with the habit, instructing in the Rule, punishing transgressions, presiding at all meetings, and performing the office of visitation.¹⁶

Descending to particulars he demands that the Tertiaries, under pain of expulsion from the Order, shall obey the Minister-General, Provincials and Guardians in all things; the Tertiaries shall consider them as their superiors in the same manner as Francis is venerated as the head and founder of the whole Order; if they fail to do this these same Superiors may deprive them of the habit and thus they loose all right to the privileges of the Order. Although in this Bull the pontiff does not expressly concede to the Provincials and the Guardians the authority of erecting Tertiary Sodalities, its implicit concession could not be more clear, for in order that these same Tertiaries be obedient to them, it is necessary that the Sodality be erected, and that they are professed therein as Tertiaries.¹⁷

This jurisdiction existed in these superiors even before

¹⁶ Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, §§ 7-8 (*Bull. Rom.*, XXIII, 285-294).

¹⁷ "Tertiarii saeculares primum generalem honorem, ejusque secundarios delegatos, sive provinciales, sive guardianos, aut etiam commissarios visitatores, tamquam suos legitimos et veros superiores vene-

the time of Benedict XIII, for the *Statutes of Innocent XI* (which enjoyed papal approbation),¹⁸ gave the Guardian authority over Tertiary Sodalities in his territory. In particular, the Statutes mention that this authority rests with the provincial in his Province and the Guardian throughout his district; the Tertiaries in isolated places (where there are no Franciscan Convents) should be provided for by a *delegated* secular priest, always saving the right of the Guardian;¹⁹ the Guardian is called the *ordinary* throughout his district.²⁰

Benedict XIII in the Bull, *Ratio Apostolici Ministerii*, June 23, 1726, grants the Minister-General of the Friars Minor Capuchin and his secondary Superiors (that is, the Provincials and at least Guardians), complete authority to erect the Third Order Secular of St. Francis, receive profession, instruct in the Rule, in one word to subject the Tertiaries completely to their authority.²¹

rentur ita ut ipsorum iudicio in dubiis et controversiis circa regulam et statuta se conforment, atque in iis omnibus, quae concernunt Ordinem ipsum, nec regulae sunt contraria, illis pareant et obediant: quod si secus fecerint, ab eisdem cassari atque habitu spoliari possint, immo nullis proinde gratiis et privilegiis gaudere decernimus et iubemus." (§ 7.) It cannot be objected that the provincials and guardians enjoy only delegated authority, for the word '*delegatos*', as is apparent from the context, is used in the sense that the Superiors are *representatives* of the Minister-General in their office. Besides, the word '*delegatos*' is used in apposition to the word '*commissarios*', the latter of which indeed seems to indicate a commission or a delegation.

¹⁸ Cf. above chap. VIII, Art. I.

¹⁹ Ad Cap. XVI.

²⁰ Ad Cap. XVIII.

²¹ " * * * Tertiarii * * * ministro generali Ordinis fratrum Minorum beati Francisci qui Capuccini appellantur, * * * et ab ejus secundariis ministris * * * in rebus spiritualibus * * * omnino dependent * * * " (§ 1) "Statuimus * * * ministro generali Ordinis fratrum Minorum * * * qui Capuccini appellantur, et secundariis superioribus ab eodem ministri dependentibus, * * * convenire et competere * * * erigere, instituere et fundare Tertium Ordinem beati Francisci * * * pro per-

The pontiff uses the same words in effect when he gives this jurisdiction to the 'Minister-General of the Friars Minor Conventual and his secondary Superiors',²² and to the same Superiors of the Third Order Regular.²³ The words 'Secondary Superiors' must of necessity have reference to the Provincials and Guardians to say the least: the context itself indicates this.²⁴

Benedict XIV defending the rights and privileges of the '*Fratres Minores Discalceati et Recolecti*' concerning their jurisdiction over the Tertiaries, declares that all who are legitimate sons of St. Francis have equal authority over them; their Superiors and Guardians may erect the Third Order wherever they have founded a convent.²⁵

In his *Rule for the Third Order*, Leo XIII empowers the Guardian to delegate a priest for the canonical visitation, which is the same as saying that he has ordinary jurisdiction.²⁶ In the *Ceremonial of the Third Order*, the Guardian

sonis saecularibus utriusque sexus, atque hujusmodi Tertii Ordinis professoribus beati Francisci scapulare sive habitum cum cingulo conferre, in rebus spiritualibus dirigere, in tertia regula beati Francisci observanda privatim et publice docere et instruere, * * * " (§ 3) (*Bull. Rom.*, XXII, 367-370).

²² Bull, *Singularis Devotio*, July 3, 1726 (o. c., 370-373).

²³ Bull, *Exponi nobis*, Sept. 30, 1729 (o. c., 856-858).

²⁴ "Jamvero Superiores *secundarii* in Ordine fratrum Minorum Capucin, uti et Observantium et Conventualium, post Ministrum Generalem, sunt *Provinciales* et *Guardiani*: igitur ad hos respective pertinere recipere ad habitum et professionem Tertii Ordinis, videlicet ad Ministrum Generalem in toto Ordine, ad Provincialem in propria Provincia, ad Guardianum in propria *Guardiniana*, seu districtu, nec non ad eos, quibus id commissum constiterit; sed illis ex dispositione *juris*, istis ex commissione *hominis*, seu delegatione Generalium, Provincialium, et Guardianiorum, pro tempore."—Antonius de Cipressa, o. c., p. 38 (the italics in this quotation belong to the original author); cf. Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 228-235.

²⁵ Bull, *Laudabile*, Aug. 2, 1745 (*Bull. Rom. Continuatio*, I, 547-550).

²⁶ *Rule III*, § 3.

is specifically mentioned as not only having authority to erect Sodalities (Art. VII), but also as presiding at all official functions of the Sodality.

Pius X, inculcating a more diffusive spread of the Third Order, recommends that Tertiary Sodalities be erected, not only where Franciscan Religious are established, but also in the parishes under the care of the secular clergy, with the necessary delegation of the Franciscan Superiors, but '*salvo semper jure et officio Praelatorum Ordinis Primi*,'¹⁷ namely, the Ministers-General, the Provincials, the Guardians and other local Superiors.¹⁸ Neither can it be said that Pius X excludes the Third Order Regular from this jurisdiction, for: a) the omission of any mention of the Third Order Regular is easily explained by the fact that this Brief is addressed to members of the First Order; b) a privilege such as the Third Order Regular enjoys over the Secular Tertiaries is considered to be perpetual unless the opposite is

¹⁷ Brief, *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 484 f.).

¹⁸ "Praelati inter regulares, supremi sunt generales, medii sunt provinciales, et infimi sunt Superiores locales, videlicet priores, rectores, guardiani, et hujusmodi, et vicarii in capite, scilicet non habentes in suis conventibus superiores; isti enim omnes sunt vere praelati cum habeant in suos subditos jurisdictionem quasi-episcopalem." Ferraris, s. v. *Regularis Praelatus*, n. 3; cf. can. 110; 198, § 1; *CpR.*, II [1921], pp. 114 f.; Vermeersch, *De Religiosis Institutis et Personis*, I, n. 412; Maroto, *Institutiones Juris Canonici*, I, n. 485; Vermeersch-Creusen, *Epitome*, I, n. 201; Ferreres, *Institutiones Canonicae*, I, n. 245; Ojetti, *Synopsis Rerum Moralium et Juris Pontificii*, s. v. *Praelatus Regularis*; the Minister-General, provincials and guardians are known as prelates in the Order of Friars Minor—cf. passim Grecchio, *Manuale Praelati Franciscani*; *Constitutiones O. M. Conv.*; *Regula et Constitutiones Generales O. F. M.*; *Regula et Constitutiones Fratrum Minorum Capuccinorum*; *Regula del Terz' Ordine Claustrale di S. Francesco D'Assisi*; Lyszcarczyk, *Compendium Privilegiorum Regularium*, p. 73 f, note 1; in particular the *Regula et Constitutiones Generales O. F. M.*, n. 572 expressly denote the Guardian as a prelate.

evident:" there is nothing in this Brief to prove that it was revoked; c) when the pontiff in this same Brief wishes to exclude the Third Order Regular he makes special mention of it: thus a short space after the above quotation, when speaking of conventions of the Third Order Secular he states 'religious *only* (dumtaxat) of the First Order can call conventions and preside at them'; hence the former words giving jurisdiction to erect and direct Sodalties are given in a *demonstrative* manner—the latter in giving jurisdiction to convoke conventions are given in a *taxative* manner; therefore the Third Order Regular retains its jurisdiction of erecting and directing Sodalties. Far from divesting the Third Order Regular of this jurisdiction, more recent pontiffs have encouraged it: thus Benedict XV praises their efforts toward the Third Order Secular in the past, insists that it is their office to be at the head of (duces) the Secular Tertiaries, and sanctions this by giving indulgences for a specified time to these same Franciscan Seculars under their care."

In the above-quoted Brief of Pius X, he indicates that the Prelates to which he refers are the Ministers-General, the Provincials, Guardians and the local Superiors, and at the same time indicates that their jurisdiction is territorially circumscribed, when he speaks of conventions of the Third Order Secular: "if the Tertiaries gather from a district, the custos or Guardian of the convent shall convoke them and preside at the convention; if from a province, the minister

" Cf. can. 4 and 70.

" Benedict XV, *Terti Ordinis a Poenitentia*, Feb. 20, 1921 (A. A. S., XIII [1921], 130 f.).

provincial; if from many provinces; the Minister General of the Order; * * *

From the numerous decrees cited it is clear that the Friars Minor have authority to erect Tertiary Sodalities, receive into the Third Order and exercise complete spiritual care over them in so far as they are Tertiaries. This jurisdiction applies to the Ministers-General anywhere in the Order, the Provincials in their Provinces, and the Guardians in their districts—the latter are those who are canonically elected Superiors of a ‘domus formata’.²²

Due to the fact that the majority of the pontifical decrees give this authority to the Minister-General ‘and his secondary Superiors’, without specifying the exact nature of their office or the manner of their being placed in office, this authority resides equally in those who are Superiors of convents and residences which are not canonically called ‘domus formatae’, as also in those who legitimately succeed in office, due to the death or absence of the Guardian, according to the Constitutions of the respective Order.²³ This interpretation is also favored by Leo XIII, when in audience granted to the four Ministers-General of the First Order and the Third Order Regular, he expressly states that ‘where

²² “Religiosi dumtaxat ex Ordine Primo coetus seu conventus sodalium Ordinis Tertii cogant iisdemque praesideant; si sodales a districtu coeant, coenobii custos seu Guardianus; si e provincia, provincialis Minister; si e pluribus provinciis, Ordinis Minister generalis.” (Brief, *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (A. A. S., I [1912], 584, n. I).

²³ Can. 488, 5°; *Regula et Constitutiones Generales O. F. M.*, nn. 315 f.

²⁴ Cf. *Regula et Constitutiones Generales O. F. M.*, nn. 579, 581; *Constitutiones O. F. M. Conv.*, Cap. VIII, Tit. XLIV; *Regula et Constitutiones O. F. M. Cap.*, nn. 156-159; *Regula del Terz' Ordine Claustrale di S. Francesco D'assisi*, p. 158, VI, wherein these temporary local Superiors are given the same local authority as the Guardians whom they supply.

there are no Franciscan Fathers, the Third Order should be promoted through *delegated* Directors';²⁴ in other words, *wherever* there is a Franciscan foundation, no matter of what nature it may be, *there* is authority to erect and direct Sodalties of the Third Order *without any delegation*—which erection and direction, from papal documents, belongs to the Superior of that community.

This jurisdiction, although ordinary, is not to be taken in the sense of canon 198, but rather in the general sense of canon 197 §1, i. e., that the Franciscan Superiors enjoy ordinary jurisdiction over the Tertiary Sodalties and their members only in their relation to the Third Order, i. e., in so far as they are Tertiaries. And since this jurisdiction is ordinary, it can be delegated to others of the Order of Friars Minor, or to both regular and secular clergy who do not belong to the Order; this delegation may be either in whole or in part.²⁵ Since this delegation to erect Sodalties in most instances is given for a particular place and is therefore not universal (*ad universitatem negotiorum*) it cannot be subdelegated unless such a subdelegation was expressly mentioned in the delegation; however if a universal delegation were given (e. g. to a bishop of a diocese), this delegation could be subdelegated.²⁶ A universal or a particular delegation would not cease *resoluto jure delegantis et re integra*, unless such a stipulation were made in the delegation.²⁷

If a delegation were given to a pastor to erect and direct a Sodality, the latter part of the delegation should ordinarily be understood in the light of canon 58 so that it would be

²⁴ July 7, 1883 (*A. M.* II, 111; Fleming, *Leonis XIII Acta ad III Ordinem Spectantia*, p. 36); cf. also the Letter of the Secretary of State of Leo XIII to the Italian bishops, Sept. 30, 1882, which has the same tenor (Fleming, *o. c.*, p. 30).

²⁵ Can. 199, § 1.

²⁶ Can. 199, §§ 3-4.

²⁷ Cf. can. 207, § 2.

given *ratione officii*, and therefore the successor in office would be able to continue receiving members and performing the office of Director or Moderator without the necessity of recurring to the Franciscan Superiors for faculties. The very nature of a Third Order Sodality as a moral person erected perpetually (*persona moralis, natura sua, perpetua est*)²⁰ postulates this interpretation of the delegation.

From the papal documents cited it is certain that the jurisdiction of the Friars Minor is territorial in regard to the erection of a Sodality and the reception of members into the same, although Gennari believes that the Franciscan Superiors can validly receive outside the limits of this territory provided they do not ascribe them to a Sodality;²¹ such Tertiaries who do not belong to a Sodality are known as solitaries (*Solitarii*). In the opinion of the writer, this view is tenable for: a) the various papal pronouncements in speaking of the jurisdiction of the Franciscan Superiors as being territorial always have reference to their authority in regard to Sodalities, i. e., their erection and the reception of Tertiaries into these Sodalities; b) canon 703 §2 allows the Religious Superiors to receive Tertiaries such as Gennari describes into the Third Order and at the same time does not limit their jurisdiction territorially in this regard; the same may be said of a decision of the S. C. of Indulgences July 14, 1891, which allows those who have faculties to receive into the Third Order without ascribing these same Tertiaries to a Sodality: this decision does not speak of any territorial limitation.²²

²⁰ Can. 102, § 1.

²¹ Gennari, *Quistioni Theologico-Morali*, n. 336.

²² A. S. S., XXIV, 448; cf. can. 68 and 50—this interpretation does not come under any of the restrictions of these canons: therefore a wide interpretation may be used. Stein, *Tertius Ordo Franciscalis*, p. 59 f, favors the opposite view.

The opinion that a Tertiary Sodality can be erected which is comprised entirely of novices^a seems to be without sufficient foundation. Obviously a Third Order Sodality, as the name implies, must be comprised of at least three professed Tertiaries (for they do not become Tertiaries until they are professed), and it is doubtful if the law could be drawn to such a point where novices could be called Tertiaries. Granted that the ordinary of the place would give his written consent for such an erection, no such jurisdiction has been given to the Friars Minor to erect such a moral person and to receive members into it. Therefore it could not be called a Third Order Sodality, and if it is not, then it is beside the question in view. The argument that religious novices are subject to the Superiors of the religious institute in which they are to become professed,^a confirms, rather than weakens, this view for, a) Franciscan Tertiary novices are subject to the Franciscan Superiors (or their delegate) *in ordine ad futuram professionem*, without the necessity of forming a Sodality; b) religious novices cannot form a *domus formata*,^a and *a pari*, Tertiary novices cannot be formed into a moral person known as a *Third Order Sodality*.

Neither can it be said that such novices are deprived of the insight into the purpose and activities of the Third Order which is necessary for their ultimate acceptance of the Rule in profession: without being formed into a Sodality they must of necessity be instructed in the Rule, and can observe all the regulations of the Third Order with the exception of the election of the officers of the Sodality, and the consequent administration of the funds of a Sodality as a moral person—two considerations which will have little bearing on their

^a Stein, *Tertius Ordo Franciscanus*, p. 26.

^a Can. 561 § 2.

^a Can. 488, 5°.

final selection of the Third Order as a means of acquiring Christian perfection.

§ 4. Method of Erection—Translation—Extinction.

The method of erecting a Third Order Sodality is given in the *Ceremonial of the Third Order*, Article VII. There is nothing mentioned however, as to the necessity of this form being observed under pain of nullity or liceity: therefore any act of competent authority with the intention of erecting a Sodality would suffice for validity." But since a Sodality is erected into a moral person, this erection becomes an act of public authority, and it is therefore necessary that public proof be available." Thus this proof of the existence of a Sodality can be either through a decree of erection—which method is advised by Benedict XIII"—or through an enactment of the one who has erected the Sodality, with the officials of the Sodality as witnesses: this method is given in the *Ceremonial of the Third Order*, Article VII."

Tertiary Societies are not bound by the *lex loci*, which does not allow two associations in the same place. Clement XII gave this concession to the Friars Minor Capuchin when he stated that they could erect Tertiary Societies even

"Cf. Gennari, *Quæstioni Theologico-Morali*, n. 336.

"Can. 99; cf. Chelodi, *Jus de Personis*, n. 98.

"Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 289)—"Injungimus * * * generali ministro * * * ut * * * Tertii Ordinis congregationes sæculares, * * * per patentes litteras * * * erigere * * * curet studeatque."

"After the erection, he who has erected the Sodality together with the officials shall deposit the testimony of the erection in the archives, which may be drawn up in this manner: "Anno Domini * * *, die * * * infrascriptus ego N. Guardianus (vel Visitor, aut Director, aut Sacerdos facultatibus legitimis a N. receptis munitus) erexi Congregationem Tertii Ordinis sub invocatione et patrocinio S. N., in loco N., Testibus N. N. presentibus. In quorum fidem cum Testibus subscripsi."

where others already are founded;" this privilege was later acknowledged by the S. C. of Indulgences, Jan. 31, 1893, when it decided that Franciscan Third Order Sodalties are not bound by the *lex loci* as laid down by Clement VIII."

On account of diversity of language, age, sex, etc., more than one Sodality of the Third Order may be erected in the same church or chapel; each may have its own proper Director and Officials, and enjoys all the indulgences and privileges, in the same manner as if there were but one Sodality in the place." Since the Third Order is not bound by the law laid down for Confraternities that they must be erected in a church, a public or a semi-public oratory," it follows that where there is lack of such a place, any permanent place may be used.

After the erection, the erector shall nominate, i. e., institute the officials of the Sodality," although this is not necessary for the validity of the erection; this was decided by the S. C. of Indulgences, Nov. 14, 1842, in regard to Confra-

" * * * Ministro generali Ordinis Capuccinorum et secundariis superioribus ab eo dependentibus, * * * conveniat et competat in quocumque loco, civitate, provincia et regno, *etiam ubi alii Tertiarii ejusdem Ordinis jam reperiuntur*, instituere et fundare praefatum Tertium Ordinem * * * " (Bull. *Apostolicae servitutis*, July 23, 1735, § 1—*Bull. Rom.*, XXIV, 61).

" "An Tertius Ordo Saecularis S. Francisci teneatur lege illa a Clemente Papa VIII in Constitutione "*Quaecumque*" d. d. 7 Decembris 1604 statuta, qua praecipitur unam tantum Confraternitatem et Congregationem ejusdem nominis et instituti erigi posse in singulis civitatibus et oppodis"? Response: "Negative." (*M. E.*, 8, Ser. I, vol. VIII, 33 f); the *A. S. S.*, XXV, 506 quotes the Constitution of Clement VIII as "*Quaeitur*"; this is evidently wrong—cf. this Const. in the *Fontes*, n. 192.

" S. C. of Indulgences, March 8, 1905 (*M. E.*, 7, Ser. II, vol. XVII, 204).

" Can. 712, § 1.

" *Ceremonial of the Third Order*, Art. VII.

ternities," and although the present question concerns a Sodality of the Third Order Secular, the parity between the two is apparent in reference to their juridical condition as a moral person, and their rights as well as privileges in reference to the election of officials and administrators.

All erections of Sodalities of the Franciscan Third Order which had been invalidly performed in good faith, were granted a sanation by a rescript of the S. C. of Religious, Jan. 8, 1924; the rescript was executed Jan. 19, 1924.⁴⁴

Translation of a Sodality. The principles regarding the translation of Confraternities from one place to another in the diocese may also be applied here. Confraternities as moral persons certainly possess this right," which may be used after the consent of the ordinary of the place has been obtained," and in the case of confraternities which are aggregated to a certain religion (which is precisely the case with Franciscan Third Order Sodalities), the consent of the Religious Superior is required;" the consent of the majority of the members, given collegiately, is also required." A Confraternity thus translated retains all its indulgences," not however those which were granted solely in connection with

⁴⁴ "An necesse sit sub poena nullitatis ut administratores confraternitatis eligantur?" Response: "Negative, quia administratores electio erit tantum ad bonum Sodalitatum regimen, minime vero ad validitatem erectionis necessaria."—ad II (*Decreta Authentica S. C. Indulg.*, n. 312).

⁴⁵ A. M., XLIII, 47.

⁴⁶ Wernz, *Jus Decretalium*, III. 2., n. 716; Cocchi, *Commentarium*, IV, n. 189, (e).

⁴⁷ Can. 719, § 1; o. c.

⁴⁸ Can. 719, § 2.

⁴⁹ Wernz, *l. c.*; Piat, *Praelectiones Juris Regularis*, II, Q. 79; Ferraris, s. v. *Confraternitas*, Art. I, n. 57; can. 101, § 1, 1^o.

⁵⁰ S. C. of Indulgences, Feb. 16, 1739 (*Decreta Authentica S. C. Indulg.*, n. 126); March 15, 1852, ad II (o. c, n. 358); Wernz, *l. c.*; Piat, *l. c.*

the place from which the Confraternity was to be transferred (*ratione loci*);⁶⁰ the rights and obligations regarding the administration of the goods are also transferred, except regarding those goods which have been given by the donors, by reason of the place from which the Confraternity is transferred (*ratione derelictae ecclesiae*).⁶¹

Due to the fact that Third Order Sodalties agree perfectly as moral persons with this specific legislation regarding the translation of Confraternities, canon 20 may be aptly applied here so that this legislation has equal reference to Sodalties of the Third Order Secular.

Extinction of a Sodality. A Sodality of the Third Order Secular is by its very nature perpetual, and therefore does not cease to exist by the mere will of its members, for it is erected by *public* ecclesiastical authority, and hence cannot be dissolved by *private* authority.⁶²

Canon law provides two methods of extinction—

a) *By legitimate ecclesiastical authority*: it is logical that the Church, which sanctions all ecclesiastical corporations, may also suppress them; for this reason the supreme pontiff, as head of all ecclesiastical bodies, may suppress it, as also the ordinary of the place for grave reasons, and saving recourse to the Holy See, i. e., the S. C. of Religions.⁶³ For the reason that a Tertiary Sodality is perpetually erected in the diocese for the good of souls, it does not seem that it can be suppressed by the Franciscan Superiors without the consent of the ordinary of the place; the very reason for its

⁶⁰ Wernz, *l. c.*; cf. Fanfani, *De Indulgentiis*, n. 3, p. 5.

⁶¹ Wernz, *l. c.*; Piat, *l. c.*; Ferreres, *Institutiones Canonicae*, I, n. 990.

⁶² Wernz, *o. c.*, n. 717; Ferreres, *La Confraternite*, n. 360, in reference to confraternities as moral persons, which is applicable to the present question through can. 20; Putzer, *Commentarium in Facultates Apostolicas*, p. 342, holds the opposite view, although giving no reasons for his opinion.

⁶³ Can. 102, § 1; 699, § 1; 251, § 1.

existence in the diocese is due to the consent of the ordinary of the place without which it cannot be erected." Certainly it cannot be *arbitrarily* dissolved by the Franciscan Superiors."

b) *Extinction of a Sodality also takes place when a Sodality has had no members for a space of one hundred years:*" due to negligence on the part of those in authority, it could happen that a Sodality with a large membership gradually dwindles down. In order to revive such a Sodality, what is to be done? If the membership in the Sodality has not been entirely vacant for a period of one hundred years, then anyone with legitimate faculties, either ordinary or delegated, can revive the Sodality by admitting Tertiaries to membership without a new erection (having of course made certain of the former legitimate erection). The reason for this is that if only one member of a moral person remains, the rights of the entire moral person remain in him," and there-

"Can. 703, § 2; Maroto, *Institutiones*, I, n. 464, note (1).

"S. C. of Bishops and Regulars, Aug. 25, 1893 (A. S. S., XXVI, 485-498); Wernz, *o. c.*, n. 718.

"Can. 102, § 1. This canon is entirely of precode origin—In 1667 a Confraternity of the Rosary was erected in the town of 'Casalbuono'. For over a space of one hundred years there were no members, but in 1882 it was revived by a new erection and the reception of new members. However, in 1826 another Congregation of the 'B. V. M. Perdolentis' had been legitimately erected in the same town. The question of precedence arose, which was decided by the Congregation of the Council, July 24, 1886, in favor of the latter society (A. S. S., XIX, 319-326). Although the principle of law is '*qui prior est tempore, potior est jure*' (*Regula Juris* 53 in VI^o), the Congregation nevertheless computed the existence of the former Society only from the year 1882, for it had lost all rights as a moral person due to the fact that it had had no members for over a space of one hundred years.

"Can. 102, § 2; thus it can be seen that although at least three physical persons are required to *erect or constitute* a moral collegiate person (can. 100, § 2), on the other hand, since once erected it is perpetual (can. 102, § 1), its *continuance* can be embodied in but one person.

fore to revive such a Sodality, only new membership is required, not a new erection. A practical case of a revival without a new erection, would be that of a Sodality in whose decree of erection the pastor of the church, *pro tempore existentiae parocchiae*, had been designated as Director. As long as the Sodality has not fallen into decay for a space of one hundred years, any pastor of this church can revive it by receiving new members, without the necessity of recurring to the Friars Minor for faculties of erection, or of receiving into the Third Order."

A translation or an extinction is not had if the church in which the Sodality was erected is destroyed and erected within fifty years in the same place, and under the same or another title. The same can be said if the church where the Sodality is erected is transferred from the care of the regular clergy to the secular, or vice versa, or if the church has been profaned and again restored to use."

ARTICLE III

The Government of Sodalities

§ 1. Membership in the Third Order

Having treated of the nature and purpose of the Third Order as well as the requisites for the erection of its Sodalities, the question concerning its members follows logically in order. Uniformity and order in any society always postulates norm and restriction regarding its members, which in the present case may be divided into two classes: the restrictions of Canon law, and the restrictions of the Rule of the Third Order.

a) *The restrictions of canon law*: Those who have taken

⁹⁹ Cf. can. 58.

¹⁰⁰ Wernz, *o. c.*, n. 717; can. 75 and 924, § 1.

vows in a religious institute cannot become Tertiaries,¹ although the words of this canon do not apply to those living in community life without vows.² This restriction regarding religious was made by the S. C. of Indulgences, July 16, 1887,³ and the same Congregation, Jan. 31, 1893, declared that this former decree automatically cut off the membership of religious in the Third Order, even though they had been Secular Tertiaries at the time of its issuance;⁴ if a religious is freed from his vows and returns to the world, his profession in the Third Order automatically revives.⁵

The decree of Jan. 31, 1893 (ad IX), confirmed by canon 705, does not allow Secular Tertiaries to belong to two Third Orders at the same time, nor to two Sodalties of the same Order; those who belonged to two Third Orders before this decree were allowed to choose the Order in which they wished to remain.⁶

For a just cause Tertiaries can transfer from one Third Order to another, or from one Sodality to another of the same Order.⁷ The Third Order Secular of Dominic at Bologna has the Apostolic indult spoken of in canon 705, so that it can receive professed members of another Third Order, so that such Tertiaries belong to two Third Orders at the same time.⁸

¹ "Qui vota nuncupavit vel in perpetuum vel ad tempus in aliqua religione, nequit simul ad ullum tertium Ordinem pertinere, etsi eidem antea fuerit adscriptus." (can. 704, § 1).

² Vermeersch-Creusen, *Epitome*, I, n. 800; S. C. of Indulgences, July 16, 1887 (A. S. S., XX, 111 f); Jan. 31, 1893, ad IV-VI (o. c., XXV, 506-509).

³ Cited in footnote 2.

⁴ Cited in footnote 2.

⁵ Can. 704, § 2.

⁶ S. C. of Indulgences, June 21, 1893 (A. S. S., XXV, 748).

⁷ Can. 705.

⁸ S. C. of Indulgences, Aug. 8, 1899 (*M. E.*, 1, Ser. II, vol. XI, 398).

Tertiaries who wish to take vows in a religious community may wear the habit of the Third Order until their religious profession, as well as take part in the indulgences and privileges of the Third Order."

Public sinners, non-Catholics, those belonging to a condemned sect, as also those who are burdened with a censure of a notorious character, cannot validly be received into the Third Order."

B) *The restrictions of the Rule*: Those who are under fourteen years of age cannot be admitted to profession; moreover candidates must be of good morals, peaceful," faithful in the practice of the Catholic religion, and in their devotion to the Holy See." Unless her confessor advises otherwise, a married woman cannot become a Tertiary without the consent of her husband."

A novitiate of one year, which ordinarily begins with the reception of the habit (unless the director judges otherwise)" must be performed before one can validly be admitted to profession in the Third Order." Since profession in the Third Order is a *new act*, the computation of the time of the novitiate must be made according to canon 34 §3, 3°

" S. C. of Indulgences, Jan. 31, 1893, ad V (A. S. S., XXV, 506-509).

" Can. 693, § 1; Masonic societies are especially understood by 'condemned sects'—cf. *Fontes*, nn. 563 and 571; Quigley, *Condemned Societies*, pp. 89-93.

" The first Rule of the Third Order spoke of the obligation of restoring ill-gotten goods, and the necessity of being reconciled to one's enemies before being admitted to the Third Order. (X, 5-9.)

" *Rule of Leo XIII*, I, § 1; again the first Rule of the Order required that those suspected of heresy be cleared of this charge before the bishop: otherwise they could not enter the Order. (XI, 1.)

" *Rule of Leo XIII*, I, § 2.

" The form for imposing the habit is contained in the *Ceremonial of the Third Order*, Art. II.

" *Rule of Leo XIII*, I, § 4; S. C. of Indulgences, Jan. 30, 1896, ad V (*M. E.*, 9, Ser. I, vol. IX, 153).

and 5°," that is, if one begins the novitiate Jan. 26, 1929, he cannot validly emit profession until Jan. 27, 1930. In the event that a novice is placed in danger of death (in periculo mortis), any priest with faculties to hear confessions, provided one cannot be called who has the necessary faculties of reception, can validly receive the profession of the novice, even though the year of the novitiate be not completed; but his name is not to be written in the register of the Sodality until death, for if he recovers, he is to make profession anew, and then his name is written in the register of the Sodality.¹⁷ This is the only reason allowed for valid dispensation from the full time of the novitiate.¹⁸ If a novice either inadvertently or deliberately throws off the habit, i. e., the scapular and cord, his novitiate is not interrupted, provided the intention of becoming professed in the Third Order was not retracted.¹⁹

For good reasons one who has been admitted to the novitiate under the direction of one Franciscan obedience (e. g. Friars Minor Capuchin), may be professed in a Sodality under another obedience (e. g. Friars Minor Conventual).²⁰

Before receiving to profession in the Third Order, the Director should decide on the worthiness of the novice with the advice of the Discretorium or officials of the Sodality,²¹ although this advice is not necessary for the validity of the profession, since no Rule of the Third Order ever demanded this under pain of invalidity.

¹⁷ Cf. Bakalarczyk, *De Novitiatu*, p. 113.

¹⁸ *Ceremonial of the Third Order*, Art. III.

¹⁹ *S. C. of Indulgences*, Jan. 30, 1896, ad V (*M. E.*, 9, Ser. I, vol. IX, 153).

²⁰ *S. C. of Indulgences*, March 4, 1903 (*A. S. S.*, XXXV, 637).

²¹ *S. C. of Indulgences*, March 4, 1903, ad I (*A. S. S.*, XXXV, 637-639).

²² *Statuta Innocentiana*, ad Cap. XIII; cf. below chap. VIII, Art. III, § 4.

In order to become a member of the Third Order, it is not necessary that one be ascribed to a Sodality,²² although it is more commendable, and the purpose and end of the Third Order is certainly better attained by a closer union of the Tertiaries. The Tertiaries being united in local groups, there will be more room and occasion for correction on the part of the Franciscan Superiors; the care of the poor and the sick will be more properly attended to.²³

In order to become a member of a Sodality, a professed Tertiary must have his name written in the register of the Sodality; this writing is necessary for validity.²⁴ If the inscription of the name of a professed Tertiary is omitted from the register of the Sodality, whether intentionally or accidentally, he nevertheless remains a member of the Third Order, but is known as a Solitarius, i. e., a Tertiary who has no membership in a local Sodality.

May a Solitarius take part in the indulgences and privileges of the Third Order? Canon 694 §2 stipulates that a Tertiary cannot become a member of a Sodality unless his name is written in the register; it is silent however as to whether local ascription is necessary in order to gain the indulgences of the Order. From this it is to be judged that local ascription has nothing to do with gaining the indulgences of the Order *as a whole*, for a) in the various indulgences which were granted to the Third Order by the Holy

²² Can. 703, § 2; *S. C. of Indulgences*, July 14, 1891 (*A. S. S.*, XXIV, 448).

²³ Pius X, Brief, *Delectavit Nos*, Dec. 17, 1909 (*A. A. S.*, II [1910], 12).

²⁴ Can. 694, § 2; those who are absent cannot licitly be inscribed, although for good reasons, it seems that this can be dispensed with; one must freely and knowingly have his name inscribed in the Register of the Sodality: otherwise the inscription is invalid.—can. 693, § 2; cf. Chelodi, *Jus de Personis*, n. 300; Vermeersch-Creusen, *Epitome*, I, n. 791.

See, inscription in a Sodality was never mentioned as a requisite; the following or similar words were used: "Indulgences granted to Tertiaries";" b) from the words of canon 692 wherein the only necessary condition for gaining the indulgences and privileges of an association is that one must be a valid member of the same: an isolated Tertiary (Solitarius) is truly a valid member of the Third Order, and he therefore takes part in its indulgences and privileges.

On the other hand where membership in a Sodality is made a condition of gaining certain indulgences, or where particular indulgences are granted to a particular Sodality, it is evident that a Solitarius cannot take part in these; e. g., in the list of indulgences attached to the Rule, Leo XIII speaks of an indulgence granted to those who attend the monthly meeting of their Sodality."

Stein" does not make such a distinction between gaining the indulgences and privileges pertaining to the Third Order as a whole, and those pertaining to Sodalities of the Order. He makes the general statement that inscription in the register of the Sodality has nothing to do with the gaining of indulgences, and to substantiate this he quotes a decree of the S. C. of the Holy Office, April 23, 1914." But this decree has been abrogated in regard to Third Order Sodalities by subsequent canon law: a Sodality of the Third Order Secular is an association, and more specifically, a moral person;" in order validly to become a member of an association which is a moral person, inscription in its register is absolutely

" Thus Leo XIII in his list of indulgences attached to the Rule simply uses these words: "Tertiariis indulgentiam plenariam just sit * * *."

" I, 3.

" *Tertius Ordo Franciscalis*, p. 32.

" A. A. S., VI [1914], 307 f.

" Cf. above Chap. VIII, Art. II, § 1; Fanfani, *De Jure Religiosorum*, n. 428.

necessary;" and further, that one may gain the indulgences and privileges which accrue to an association (which in the present case is a moral person), 'necesse est et sufficit, ut quis in eam valide receptus sit * * *';" this certainly contains an invalidating clause," therefore since a Tertiary who has not had his name written in the register of the Sodality, is not a valid member thereof, neither can he partake in its indulgences and privileges.

Consequently, in order to partake of the indulgences and privileges pertaining to Sodalities of the Third Order Secular of St. Francis, one must have his name written in the register of the Sodality; hence a distinction must be made between these benefits granted to the Third Order *as a whole*, and those granted to *Sodalities* of the Third Order. For these reasons, if a Tertiary wished to become a member of a Sodality of the Third Order, and his name was not written in the register, even though it were through neglect or inadvertence, he cannot partake in the indulgences, rights and privileges of a Sodality."

All admissions to the reception of the habit and to profession in the Third Order which had been invalid through essential defects committed in good faith, were granted a sanation by a rescript of the S. C. of Religious, Jan 8, 1924; the rescript was executed Jan. 19, 1924."

Dismissal from the Third Order. Although profession in

" Can. 694, § 2.

" Can. 692.

" "Legitime receptus et non expulsus, hoc solo titulo fruitur associationis juribus, privilegiis, indulgentiis aliisque gratis spiritualibus." (Verneersch-Creusen, *Epitome*, I, n. 793; Cocchi, *Commentarium*, IV, n. 178, states that it is absolutely essential (omnino ac essentialiter) that one be validly received into an association in order to partake of its indulgences and privileges.

" Cf. Piat, *Praelections Juris Regularis*, II, Q. 71.

" A. M., XLIII, 47.

the Third Order is made for the term of one's life," on the other hand it would be illogical, and the very purpose of the Third Order would be frustrated if a recalcitrant member could not be dismissed, who by his life not only refused to observe the Rule for himself, but was also an occasion of scandal and laxity to other Tertiaries. Therefore the first Rule of the Order, while insisting on the perpetuity of the promises made in profession, at the same time gave the fraternity the right of expelling incorrigible members."

A Tertiary may be dismissed for a just cause, according to the statutes of the Order; "the Rule of Leo XIII determines this cause to be just when a member of the Sodality remains disobedient after a third admonition." For more serious defections, as in canon 696 § 2, members may be dismissed after one admonition, '*salvo jure recursus ad Ordinarium*', that is the Franciscan major Superiors."

Due to the fact that the Provincial with the Definitorium can enact particular statutes for Third Order Sodalities of his province," in these same statutes provision may also be made for reasons of dismissal which are not contained in the

"The first Rule of the Order makes this provision: "De hac fraternitate et de iis quae hic continentur nemo exire valeat nisi religionem ingrediatur." (X, 2.) "Ordinamus statuentes ut nullus post ipsius fraternitatis ingressum de eadem egredi valeat ad saeculum reversurum." (*Rule of Nicholas IV*, II.)

"Incorrigibiles fratres et sorores a fraternitate ejecti iterum in ea nullo modo recipiatur, nisi saniori parti fratrum placuerit." (XI, 3.)

"Can. 696, § 1.

"Sodales nec obediētes et noxii iterum et tertium admoneantur officii sui: ni pareant, excedere Ordine jubeantur." (III, § 4.)

"That the Franciscan major Superiors are comprehended is evident from the fact that the Provincial is Superior over all Tertiary Sodalities in his province, and the Minister-General over all in the Order. § 3 of the same canon indicates this by distinguishing the ordinary mentioned in that paragraph as '*Ordinarius loci*'.

"Cf. above chap. VIII, Art. I.

Rule itself." It is evident that those who govern the local Sodalties, whether by ordinary or delegated authority, have the right to dismiss the Tertiaries; this authority is also vested in the one who performs the canonical visitation." Therefore the Director, or Moderator, have the right to dismiss even though the statutes mention nothing in this regard; this applies also to the ordinary of the place."

Since nothing is mentioned in this canon concerning the reasons for dismissal, but simply gives this authority to the Superiors of Sodalties, it implicitly gives them the right of determining in particular cases, what reasons shall be considered as sufficiently grave to warrant dismissal. The Rule (III § 4) also implies this in these simple words: "Sodales nec obedientes . . . excedere Ordine jubeantur."—which disobedience must logically be determined by those in authority. Thus sufficient reason for dismissal would be repeated defection from those principles which Pius X declared should be followed by Tertiaries."

Dismissal from the Sodality also implies dismissal from the Order," although it would seem that for such offenses as failure to attend the meetings prescribed, or neglect of interest in the activities of the Sodality etc., would really not come under the heading of disobedience, and while giving warrant for dismissal from the Sodality, yet would hardly be sufficient reason for rejection from the Order, provided

" Cf. 696, § 1.

" Cf. *Rule of Leo XIII*, chap. III.

" Can. 696, § 3.

" " * * * Tertii Ordinis institutum in hoc consistere ut sodales evangelicae perfectionis praecepta in cotidianum usum ipsi deducant, et christianae vitae exemplar ceteris ad imitandum proponant."—Brief, Tertium Franciscalum Ordinem, Sept. 8, 1912 (*A. A. S.*, IV [1912], 585).

" "Sodales nec obedientes * * * excedere Ordine jubeantur." (*Rule of Leo XIII*, III, § 4.)

the general Rules of the Order had been observed.

Since profession in the order is for the term of one's life, a Tertiary cannot freely relinquish it without the acceptance of those in authority; but even if the resignation were not accepted, such a Tertiary would lose all right to the indulgences and privileges of the Order." For reinstatement (if such a term may be used) of such a negligent Tertiary in the Order and in its indulgences and privileges, it is only necessary that the scapular and cord be reassumed—a second profession is not necessary unless the Franciscan Superiors (or their delegate) have accepted his resignation, i. e. have dismissed him from the Order."

One who is dismissed from the Order *ipso facto* loses the right to all indulgences and privileges," and in order to become a member a second time, a second novitiate and profession would of necessity be required."

"Hilarius Parisiensis, *Liber Tertii Ordinis*, p. 256; The Rule of Leo XIII, I, § 3, requires that the scapular and cord must be worn in order to partake of the rights and privileges of the Order and the Sodality; it is but natural that one who freely leaves the Third Order will also cease wearing these, and therefore deprive himself of the indulgences and privileges. If such a resignation were accepted, it is equal to dismissal from the Order.

"Tischler, *Handbuch zur Leitung des Dritten Ordens*, p. 128 f; Beringer, *Die Ablässe*, II, n. 371; S. C. of Indulgences, May 27, 1857 (*Decreta Authentica S. C. Indulg.*, n. 379).

"Rule of Leo XIII, I, § 3; Benedict XIII, Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725, § 7 (*Bull. Rom.*, XXII, 285-294); can. 692.

"The words of the Rule of Leo XIII, III, § 4, " * * * *excedere Ordine jubeantur*", and those of canon 696 "*dimittatur*", "*expugnatur*", "*dimittere*", can be understood in no other manner than that of complete severance from the Order, i. e. that one is no longer a member: therefore in order to become a member a second time, it is logical that the only method by which this can be obtained is by the performance of those actions which are required to become a member—which in the case of the Third Order is brought about by novitiate and profession. One might object by adducing as a parity canon 704 which states that the profession of a Secular Tertiary who has taken religious vows, auto-

A Third Order Sodality is a moral person organically constituted, with its Director and Tertiary officials, and therefore in cases where sufficient reason for dismissal is not openly apparent, it is well that the officials of the Sodality be consulted, particularly in their monthly meeting with the Director as prescribed in the Ceremonial of the Third Order, Article IV.²⁴

The dismissal of a *Solitarius* involves some difficulty regarding the required jurisdiction. Practically speaking, this question seldom arises, as Tertiaries with few exceptions belong to Sodalities, and if they do not, there is very little room for observance on the part of the Franciscan Superiors as to whether such Tertiaries are fulfilling their obligations; for the very reason of their isolation from other Tertiaries, the main reason of their dismissal—scandal and consequent laxity in other Tertiaries—becomes obviously insignificant. According to the general principles of jurisdiction it is safe to assume that those who receive isolated Tertiaries into the Third Order with legitimate jurisdiction, also have the right of dismissal, for they thus become their Superiors in so far as they are Tertiaries. It would also seem that a safe norm to follow in this regard would be that such Tertiaries are subject to the Franciscan Superiors in whose Territory they reside,

atically revives when he is released from these religious vows. There is no parity here for a) this is a positive disposition of the law for a particular case; b) canon 704 concerns one who of his own free will leaves the Third Order *only indirectly*, and whose resignation is not necessarily accepted by the Superiors of the Third Order; the opposite is true of a dismissed Tertiary, for he is *rejected* from the Order; therefore in the case of the religious, his profession in the Third Order is *silenced*, rather than *dissolved*; c) in canon 704 there is question of one choosing a *higher* state of life, while a disobedient Tertiary chooses a *lower* state by disobeying the Rules and thus subjecting himself to dismissal.

²⁴ Cf. canon 697, § 1; below chap. VIII, Art. III, § 4.

according to the principles of domicile contained in canons 91-95.

§ 2. The Inter-relation of the Franciscan Jurisdiction."

Although Pius X expressly forbids any distinction between Tertiaries by reason of their name and origin, namely that all are *Franciscan* Tertiaries, no matter to which Franciscan Family they are subject as Tertiaries," nevertheless in order to avoid confusion, distinctive lines must be drawn regarding the intermingling of the jurisdiction of the various Franciscan Families. The very purpose of the Third Order as expressed in the Rule, demands peace, equanimity and harmony among the brethren. How could this be accomplished if a Friar Minor of one obedience (e. g. Leonine) would be allowed to freely concern himself with the Tertiaries under the care of the Franciscans of another obedience (e. g. Conventual)? on the one side there would be disorder and confusion among the Friars Minor themselves as to who enjoyed the juridical rights toward a certain Sodality; on the part of the Tertiaries the disruption would be still more apparent: to whom would they go for advice and instruction on points of the Rule; who would possess authority of dispensing from obligations of the Rule; whom would they obey as their legitimate Superiors? These difficulties are solved by the following norms:

a) Sodalities which have been erected through the jurisdiction of one Franciscan obedience, cannot be transferred to the care of another obedience without having first obtained the consent of the obedience which erected the Sodal-

"I. e. the Friars Minor Leonine, Conventual, Capuchin and Third Order *Regular*.

"Brief, *Septimo jam pleno*, Oct. 4, 1909, IX (A. A. S., I [1909], 735).

ity;" this of necessity also implies permission of that Franciscan obedience to whose jurisdiction the Sodality wishes to be, or is to be, transferred.

b) A Sodality erected by one obedience, but up to the present directed by another obedience living in the same province or city, is lawfully under the authority of the obedience which erected the Sodality, unless this latter obedience legitimately transferred its right of government to another obedience; in other words, under all circumstances, that obedience which erects a Sodality, *ipso jure* has the right of government, until it legitimately transfers it to another obedience.⁶⁶ On this principle if a Guardian of the Conventual obedience who had erected a Sodality, would relinquish that territory, nevertheless another obedience (e. g. Leonine) living in the same place would not be able to assume the reigns of government until it had obtained the consent of the Conventual obedience.

c) Sodalities which have been erected by bishops or priests with legitimate delegation, remain under the authority of that Franciscan Family from which the delegation was legitimately received.⁶⁷

d) Novices who have received the habit from one obedience, may for the sake of their own convenience be professed in a Sodality which is under the jurisdiction of another obedience.⁶⁸

e) A priest who has delegated faculties from one obedience to receive into the Third Order, cannot by this faculty alone, also receive Tertiaries into a Sodality which is under

⁶⁶ *S. C. of Religious*, Dec. 6, 1911, ad I (A. A. S., IV [1912], 143).

⁶⁷ *Ibidem*, ad II.

⁶⁸ Pius X, Brief, *Tertium Franciscaliū Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 584 f).

⁶⁹ *S. C. of Indulgences*, March 4, 1903, ad I (A. S. S., XXXV, 638).

the jurisdiction of another obedience."²

f) A Tertiary enjoys the benefit of the Papal blessing and the blessing with plenary indulgence, which are allowed on certain days, even though he has received these blessings from a Director of a Sodality which is under the jurisdiction of an obedience different from his own Sodality."³ A *fortiori* he may validly receive these blessings from a Director of another Sodality which is under the same jurisdiction as his own proper Sodality.

g) If a pastor or any priest who has been Director of a Sodality under the jurisdiction of one obedience, is transferred to a place and there finds a Sodality of a different obedience, he needs no new faculties to direct this Sodality, but he must inform the canonical Visitor that the two together may provide for the Sodality."⁴ The same would be true if a Director were transferred to a place where there is a Sodality under the same obedience as the Sodality he formerly directed.

h) For a just cause Tertiaries may transfer from their own Sodality to another which is under the jurisdiction of a different obedience,"⁵ and for the same reason they may transfer from one Third Order to another, or from one Sodality to another under the same obedience."⁶

The most common and just reason for these various changes from one Third Order to another, or from one Sodality to another, would be change of residence or a similar motive.

² *S. C. of Indulgences*, Jan. 30, 1896, ad IV (*M. E.*, 9, Ser. I, vol. IX, 153).

³ *Ibidem*, ad III.

⁴ *S. C. of Indulgences*, March 4, 1903, ad III (*A. S. S.*, XXXV, 638).

⁵ *Ibidem*, ad II; can. 705.

⁶ Can. 705.

§ 3. The Institution of Directors for Third Order Sodalties."

Nisi privilegium apostolicum aliud expresse caveat, nominatio moderatoris et cappellani pertinet ad loci Ordinarium * * * in associationibus a religiosis vi apostolici privilegii erectis extra proprias ecclesias; in associationibus vero erectis a religiosis in propriis ecclesiis requiritur tantum Ordinarii loci consensus, si a Superiore moderator et cappellanus e clero saeculari eligantur."

The Friars Minor enjoy the right of governing Sodalties of the Franciscan Third Order Secular whether these Sodalties are erected in their own proper Churches or outside of them—

The explicit words *moderator* and *Director* were not used in the papal pronouncements wherein the jurisdiction of the Friars Minor over all Tertiaries was asserted, no matter where their Sodality was located, but their equivalent was used: they were given the apostolic privilege of performing everything toward the Tertiaries which is the right and duty of a Director, in one word, to provide for their spiritual welfare in as far as they are Tertiaries.

The oft-quoted words of Benedict XIII are very clear on this matter: "

Lamenting the fact that some Tertiaries had not obeyed the Franciscan Superiors he states that 'the Holy See desires the Tertiaries to be under the care and jurisdiction of the Minister-General and the provincials,'" and in the same

"In this treatise the word '*Director*' is used instead of '*Moderator*' as in can. 698, as this is the common term used for one at the head of a Franciscan Third Order Sodality.

"Can. 698, § 1.

"Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725 (*Bull. Rom.*, XXII, 285-294).

"* * * dicti Ordinis saeculares * * * ministri generalis * * * et provincialium * * * curae et jurisdictioni * * * haec Sancta Sedes eos subesse voluit * * *" (§ 5).

paragraph he especially deplores the fact that the ordinaries of the places, 'either at their own instance, or at the instigation of the Tertiaries' (*aut sua sponte, aut ad eorum fratrum Tertiariorum instantiam*), have unlawfully exercised jurisdiction over the Tertiaries; he therefore renews and approves each and every Apostolic constitution which had given any jurisdiction to the Friars Minor over the Tertiaries. But here the pontiff may be said to be speaking only in general terms.

Speaking more specifically, he demands that all Tertiaries (*universis et singuli hujusmodi instituti professoribus*)—therefore those who are members of Sodalities erected outside of Franciscan Churches, as well as those who erected in them—should obey the Minister-General and his secondary Superiors, and even the commissary visitors (*commissarios visitatores*) in all things: 'in all doubts and controversies concerning the Rule and statutes, in fact in all things which pertain to the Order and are not contrary to the Rule', otherwise these Superiors may deprive them of the habit (*cassari atque habitu spoliari possint*), and such disobedient Tertiaries are *ipso facto* deprived of all spiritual favors as well as privileges of the Order. (§ 7.)

In the following paragraph he expressly conceded to the Friars Minor the privilege of establishing Directors outside of Franciscan Churches. The Minister-General is enjoined that through his Secondary Superiors Sodalities of the Third Order shall be established everywhere, Tertiaries shall be received, and to these he shall assign, to the exclusion of all others a 'commissary visitor or confessor, of suitable age and sanctity of life, who shall administer the sacraments, instruct in the Rule, call the meetings, preside at

these and all other functions, and cast the deciding vote in the event of a tie.' (§ 8.)"

Not only has this right of the Friars Minor been acknowledged by succeeding pontiffs, but they have also urged that it be put to practical use. Leo XIII, in an audience granted to the four Ministers-General of the First Order and the Third Order Regular, places upon them the obligation of promoting the Third Order through their own priests and visitors, and where there are no religious of the Order, through *delegated* Directors."

"Note is to be taken of the words 'commissarium visitatorem'; for this is evidently a *delegation*, and therefore refers not to one who performs this office in a Franciscan Church or convent, but to a place where delegation is required to exercise this authority—therefore in a place outside of Franciscan Churches or convents—for the same pontiff, in speaking of Franciscans providing for the Tertiaries gives this office to the 'secondary Superiors'; thus also the *Statuta Innocentiana* (which were promulgated before the time of Benedict XIII and which he himself approves in this Bull) calls the Guardian the *Ordinary* in his district: therefore he requires no delegation. It should also be noted that in papal documents the word visitor is used promiscuously for both the *canonical* visitor and the Director (or moderator as in canon 696, § 1); hence the office indicated must be determined not by the name used, but rather by his rights and duties as enumerated in the context of the papal documents. Hence from the manifold duties which Benedict XIII places upon this visitor, it is evident that he has reference to the person who today is called Director or moderator, for in the same paragraph of the Bull, immediately following the words cited above, he enumerates the duties of the one who performs the *canonical visitation* in Third Order Sodalties; therefore he has reference to two distinct persons: the Director or moderator, and the visitor. Thus also Pius X uses the words 'praesides seu Visitatores', but from his description of this person and his duties it is clear that he has reference to the Director.—Brief, *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 584).

"July 7, 1883 (A. M., 110 f; Fleming, *Acta Leonis XIII ad III Ord. Spectantia*, p. 36); cf. the *Ceremonial of the Third Order* approved a short time before this audience by the same pontiff (June 18, 1883), wherein the Director of whom Leo XIII speaks, imposes the habit, receives profession, and presides at the functions of the Sodality.

Pius X is still more explicit on this point, and advocates the spread of the Third Order by saying that 'nothing could be more opportune than that Sodalties are erected not only in Franciscan Churches or convents (coenobia), but also in other places, especially in parish churches whose priests should be delegated as moderators with the advice of the bishop, unless there are reasons to the contrary, *salvo semper jure et officio praelatorum Ordinis Primi*'.²⁰

The Franciscan Superiors may therefore delegate Directors outside of their own proper Churches and convents. How far do the rights of the Ordinary of the place reach in the matter of establishing such Directors? Order and the principles of jurisdiction in the Church demand that a priest from one parish cannot, even though he has received the delegation of Director from the Franciscan Superiors, freely invade another parish and there direct a Tertiary Sodality. Therefore canon 696 § 1 provides that when Sodalties are erected outside of Franciscan Churches, the ordinary of the place should appoint the priest who is to be director of the Sodality; this priest in turn shall apply for faculties to direct the Sodality from the Franciscan Superiors. This is in reality what Pius X inculcates in the Brief cited above when he states that upon the advice of the bishop, the care of these Sodalties should be given to the secular clergy of the Church wherein the Sodality is erected. The permission of the bishop is required for the erection of these Tertiary Sodalties (can. 703 § 2; 686 § 3), and therefore it would not be going beyond the meaning of canon 698 § 1, that when a pastor applies for this permission of erection, the ordinary of the place is understood to be giving him permission to Direct the Sodality with the required

²⁰ Brief, *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (A. A. S., IV [1912], 584 f); this has equal reference to the Third Order Regular—cf. above p. 110 f.

delegation of the Franciscan Superiors. This also has its practical value, for thus the Friars Minor can delegate the pastor, *ratione officii*,⁷⁰ so that the next incumbent in office will also be Director without the necessity of recurring to the Franciscan Superiors for delegation.

If the Friars Minor would delegate a priest without consulting the ordinary of the place, his directorship would be valid but illicit, for since they enjoy ordinary jurisdiction, they may freely delegate it to others; besides canon 698 § 1 does not contain an invalidating clause and prescribes no set method of installing in office.

If a Friar Minor, whether by ordinary or delegated authority, is to be Director in a place outside of the Order, he is required to obtain the consent of the ordinary of the place as well as his religious Superior; if he is to be Director in another Church or convent of the Order, he requires the consent of his Superior as well as that of the pastor or Superior of the place where he is to be Director; the ordinary of the place has no rights in regard to Friars Minor who are Directors in Franciscan Churches.⁷¹ If, however, a secular priest is to be Director of a Sodality in a Church or convent of the Friars Minor, the consent of the ordinary of the place is required;⁷² it does not seem that this consent would be required for a priest who belonged to a community without vows, for although he cannot be called a religious,⁷³ he nevertheless has his own superiors besides the ordinary of the place.⁷⁴ If a religious other than a Friar Minor is to be director in a Church or Convent of the Friars Minor, only the consent of his Superior is required; if in a

⁷⁰ Cf. can. 58.

⁷¹ Can. 698, § 1.

⁷² *Ibidem*.

⁷³ Can. 673.

⁷⁴ Cf. can. 673-681.

Church or Convent outside of the jurisdiction of the Friars Minor, his religious Superior as well as the ordinary of the place is to be consulted."⁷⁶

In the event that the Friars Minor would recall the delegation of a Director and it would be accepted by him," if they (the Friars Minor) refused to provide for the Tertiaries, there is no reason why the Tertiaries could not have recourse to the Franciscan major Superiors, and this failing, to the S. C. of Religious."⁷⁷

The Ministers-General in the whole world, the provincials in their provinces and the local Superiors in their districts have ordinary jurisdiction to erect and direct Sodalties."⁷⁸ Due to the limitation of the territory ordinarily accorded to a local Superior, it is obvious that the delegation to erect and direct Sodalties should generally be sought from the Ministers-General or the provincials.

The ordinary of the place has the right to recall the Directors whom he has the right to appoint," although through this revocation, such Directors would not lose the jurisdiction which has been accorded them by the Friars Minor."⁷⁹ The same may be said regarding the other superiors in the various cases cited above.

§ 4. The Discretorium or officials of a Sodality.

One of the privileges arising from the fact that a Third Order Sodality is a moral person, is that its members have juridical rights regarding the government and affairs of the

⁷⁶ Can. 698, § 1.

⁷⁷ Can. 207, § 1.

⁷⁸ Cf. 251, § 1; A. S. S., XXVI, 238-247.

⁷⁹ Cf. above chap. VIII, Art. II, § 3.

⁸⁰ Can. 698, § 3.

⁸¹ Cf. can. 207, § 1.

Sodality."¹ This authority is therefore vested not only in the Director, but also in the officials of the Sodality chosen by the members to represent the whole, who together with the Director shall convene monthly and decide on affairs of the local organization."² Acts decided upon at these meetings without the Director or his delegate presiding have no juridical value."³ This is evident from the ordinary canonical authority which the Friars Minor or their delegate have the right of exercising over Tertiary Sodalities.

On the other hand it is against the principles of canon law and the juridical concept of the government and organization of a moral person that the Director of a Sodality entirely assume to himself the full authority over the Sodality, especially regarding matters of importance which require deliberation, without giving the board of officials any voice in the matter."⁴ In addition to the right of consultation, each of these officials has separate duties. The number of offices that shall be created and filled is best regulated by the needs of each Sodality, depending on the number of Tertiaries and their activities."⁵ In the Rule of Leo XIII the general term '*praefecti*' is used for the various officials "⁶—which term Mileta explains by designating the various officials comprehended, together with their duties and obligations, such as novice-master, secretary, treasurer, etc."⁷ However the rule of necessity as mentioned above, would indicate the safest and most reasonable norm

¹ Can. 101, § 1; 697; 691.

² *Ceremonial of the Third Order*, Art. VIII.

³ *Statuta Innocentiana* ad Cap. XIII.

⁴ Cf. Stein, *Tertius Ordo Franciscalis*, p. 68-72; Woywood, "The Director and the Board of Officers", *Third Order Forum*, VI [1927], p. 53-56; Holzapfel, *Die Leitung des Dritten Ordens*, p. 104-124.

⁵ *Statuta Innocentiana* ad Cap. XV.

⁶ II, §§ 11 and 13.

⁷ Mileta, *Enchiridion pro Directoribus Tertii Ordinis*, p. 60-70.

in determining the number of officials and their duties.

There is nothing in the Code or in the Rule of the Third Order forbidding the practice of instituting two bodies of discretorii or officials, that is, one for each sex of the same Sodality; this is rather to be commended than condemned, for it is evident that the office of vigilance over the novices (novice-master, novice-mistress), care of the sick and poor can the better be discharged if the officials are of the same sex as those under their care. This practice is tacitly confirmed by the *Ceremonial of the Third Order*, which states that the same method of procedure is to be followed in the election of Tertiary women and men.¹⁰ But in this event the Tertiaries of both sexes would not be excused from attending the monthly meetings, unless there were two distinct Sodalities: the one for men, the other for women.¹¹

The institution of officials: The selection of officials for various offices of a Sodality is a matter which touches upon the welfare of the whole body; hence Leo XIII wisely enacts that the elections are to take place by calling together all the members of the Sodality,¹² that is, by a free election and confirmation by the head of the chapter or gathering, i. e. the Director.¹³

Canon 697 § 2 clearly rules that these elections are to be carried out according to canons 161-182 and according to particular statutes which are not contrary to these canons. Neither is there any reason to depart from this method in

¹⁰ Article IV.

¹¹ For reasons of diversity of sex and other just causes, separate Sodalities can be erected in the same place.—*S. C. of Indulgences*, March 8, 1905 (*M. E.*, 7, Ser. II, vol. XVII, 204).

¹² "Officia, advocatis ad conventum sodalibus, deferantur * * *" (Rule of *Leo XIII*, III, § 1); that this is an election and not a mere installation of one who has been selected before, is clear from the words of the *Ceremonial of the Third Order*, Art. V.

¹³ Can. 162; 174; 177.

conferring the offices of the Sodality. Some would mitigate the procedure of the Code in this regard, using the argument that since a Third Order Sodality is only an association of the laity, not all the laws of the Code are to be strictly observed as in solemn canonical elections, thus distinguishing between elections *majoris et minoris momenti*.¹⁰ But in the present case this argument seems to have little weight for canon law expressly and clearly states that these elections are to take place according to canons 161-182, and according to statutes which are not opposed to it.¹¹ Neither can it be said that the Code does not intend this method for the laity as well as the clergy, for the canons bearing on election indicate that it is for both laity and clergy.¹² Therefore since Canon law ordains a specific method of installing in office, there seems to be no room for distinction.¹³

Besides, elections of lay people which are carried out according to the norms of canon law do not imply such a great difficulty of procedure: even according to the *Rule of Leo XIII*, all the members of the Sodality must be called in order that the elections may take place.¹⁴ Why then should there be such great difficulty in following out the remainder of the prescriptions of common law? Then, too,

¹⁰ Thus, Stein, *Tertius Ordo Franciscalis*, p. 70 f, uses these arguments by referring to elections of major and minor moment, as brought out by the *S. C. of Bishops and Regulars* in 1865 (*A. S. S.*, I, 153-163), and in 1867 (*o. c.*, 234-238); he also refers to Reiffenstuel, Tom. I, tit. 6, *de elec.*, 112 for this distinction.

¹¹ Can. 697, § 2.

¹² Cf. can. 172, § 2.

¹³ Cocchi, *Commentarium*, IV, n. 181; Vermeersch-Creusen, *Epitome*, I, n. 789; Augustine, *A Commentary*, III, p. 438; Ferreres, *Institutiones Canonicae*, I, n. 969; Chelodi, *Jus de Personis*, n. 299, do not attempt to mitigate this method of election in any manner; they simply state that the common law of canons 161-182 and particular statutes not opposed to it, must be observed.

¹⁴ *Rule*, III, § 1.

canon 697 permits the use of statutes which are not contrary to the common law. Thus canon 162 § 1 allows custom or statute to be used in calling together the electors. It is a simple matter to summon the Tertiaries to the election at the monthly meeting prescribed in the Cereimonial, Art. I, and in this manner there is very little danger of a third of the members being neglected as to render the election invalid." If these monthly meetings are held regularly and the Tertiaries are instructed to attend these (which they will if they are not neglectful), there is no reason why one of these conferences cannot be used to summon them to the triennial (Cf. Rule, III § 1) election; for this reason if a third were absent it cannot be said that they were neglected in the sense of canon 162 § 3; rather it is through their own neglect that they were absent, and it is practically impossible that a third of the members of the Sodality will have a *legitimate* excuse for absence;" the defect of summons does not invalidate the election, provided those who were neglected were present." The voting must be secret under pain of invalidity;¹⁰⁰ consequently even particular statute cannot validly allow votes to be cast in any other manner. On either the first or second ballot, he is considered elected who has received more than half of the votes validly cast; on the third ballot a relative majority is sufficient, that is, he is elected who has received the greatest number of votes among those who were favored in any way; if the votes are equal on this ballot, the head of the

⁹⁷ Can. 162, § 3.

⁹⁸ It is not necessary that all the Tertiaries be present at the election: provided the summons is legitimately made, the right of election devolves upon those who answer the summons by attending the election. (Can. 163.)

⁹⁹ Can. 162, § 4.

¹⁰⁰ Can. 169, § 1, 2°.

chapter or gathering may cast the deciding vote;¹²² if he declines to do this, he is considered elected who is senior in orders,¹²³ profession, or age among those who have received an equal number of votes on the third ballot.¹²⁴ Confirmation of the one who is elected is made by the head of the chapter or gathering; this cannot be denied if the one elected is suitable for the office and the election had been legitimately conducted.¹²⁵

An example of a diversion from the ordinary canonical method is that given in canon 172 § 1 wherein the full right of election is given by the electing Tertiaries to one or more of the electors, or to one who is extraneous to those who are electing; this authority must be given unanimously and in writing.¹²⁶ This mode of procedure in conducting elec-

¹²² Can. 101, § 1, 1°; Benedict XIII, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 285-294), mentions of the Director: "duplex etiam in paritate suffragium ferat;" Woywood, "The Director and the Board of Officers", *Third Order Forum*, VI [1927], p. 54, denies to the president of the chapter the right to cast a vote, quoting canon 715 as an argument. While it is true that canon 697, § 1, after stating that associations legitimately erected have the right of electing officers, at the end adds the words: "*firmiter praescripto can. 715*", it by no means implies thereby that canon 715 must be observed in the elections of *all* associations; '*firmiter praescripto*' simply means that canon 715 must be observed, that is, all associations should conduct their elections according to common law, while in the elections of officials for confraternities, the additional prescriptions of canon 715 are binding. Did canon 697 § 1 use the words '*ad normam can. 715*', then one would have to admit that this latter would be common law for elections in all associations; but the words '*firmiter praescripto can. 715*' indicate that this canon must be observed in those things to which it has reference, namely in the elections of officials for *confraternities* alone. Therefore canon 715 has no reference to the elections of officials for Third Order Sodalities, for the Third Order is not a confraternity.

¹²³ Cf. can. 106, 3°.

¹²⁴ Cf. can. 174; 101, § 1, 1°.

¹²⁵ Can. 177, § 2.

¹²⁶ Can. 172-173.

tions may be employed by any association in which there is no law to the contrary,¹⁰⁰ and since there is nothing in the Rule of the Third Order forbidding it, this method may be *favoured* in the statutes; this act of giving one or more persons the full right of selecting for office is known as a *compromise*.¹⁰¹

Under no consideration may the practice be allowed of Directors of Sodalties choosing for office without consulting the members of the Sodality.¹⁰² Such procedure is evidently invalid for the Director would be assuming to himself a right which was never given to him;¹⁰³ it is entirely opposed to the juridical concept of a moral person with the inherent right of its members to elect their officials,¹⁰⁴ and this practice has been reprimanded by the Holy See: in a dispute between a Tertiary Sodality and the Franciscan Superiors, the S. C. of the Council was asked whether these offices should be filled by the Superiors alone, or ac-

¹⁰⁰ Can. 172, § 1.

¹⁰¹ Can. 172, § 1. The word *favoured* is used because this method could not safely be embodied in the statutes as a set of mode of procedure, for the reason that those who have the right of electing must unanimously consent to this usage—which consent must be given at each election, for it would be no more than gratuitous to assert that the same Tertiaries who take part in one election, will also take part in the next, and will consent to this compromise; Cf. Chelodi, *Jus de Personis*, n. 139, c; only a sketch of an election is given here, and therefore statutes and the remainder of the canons bearing on election must necessarily be consulted regarding the other requirements for election, as well as the necessary qualifications of the one who is elected and the electors. This latter consideration, however, will cause little difficulty if the Director is vigilant regarding the reception and rejection of undesirable Tertiaries as has been outlined above.—cf. above chap. VIII, Art. III, § 1.

¹⁰² Thus Cerri, *Il Ters' Ordine Francescano*, p. 77, while favoring a free election, is of the opinion that absolutely speaking, offices can be conferred by the Director alone.

¹⁰³ *Rule of Leo XIII*, III, § 1; can. 697.

¹⁰⁴ *Ibidem*; can. 101.

ording to the statutes of the Third Order, i. e. by a free election; the Congregation replied that the latter method must be used.¹²¹

The practice of the Director naming certain individual Tertiaries as being suitable for certain offices is not contrary to the Code, provided that entire freedom is allowed to the electors to choose either those who were mentioned or others. In fact this is to be commended if there is danger that the electors have insufficient knowledge of the qualities and capabilities of the various members of the Sodality.

The authority of the officials is to be considered as domestic, rather than dominative, and subject to the Superior or Director of the Sodality.¹²² On the other hand the Director would be derogating from the juridical rights which a Sodality enjoys as a moral person were he to arrogate to himself entirely the complete government. Hence in affairs of greater moment the officials are not to be ignored, e. g. regarding the reception and expulsion of members. It is evidently with this thought in view that the *Ceremonial of the Third Order* prescribes a monthly meeting of the Director with the officials of the Sodality.¹²³

§ 5. The Administration of the Goods of a Tertiary Sodality.

Unless expressly forbidden to the contrary, all associations legitimately erected may possess and administer temporal goods.¹²⁴ From the very beginning, the Rule of the Third Order, far from forbidding the possession of tem-

¹²¹ Aug. 25, 1893, ad III (A. S. S., XXVI, 485-498).

¹²² Stein, *Tertius Ordo Franciscalis*, p. 71.

¹²³ Article IV. In the following pages the rights of the officials in respect to the administration of the goods of a Sodality will be outlined.

¹²⁴ Can. 691, § 1.

poral goods, has rather encouraged it, especially for the care of the sick and the poor as will be presently shown. The present *Rule of Leo XIII* explicitly demands the administration of temporal goods when it specifies that the sick shall be cared for in a charitable manner from the contributions of the members of the Sodality.¹²⁵ Necessarily connected with the possession of temporal goods is the question regarding whose competence and right it is to administer them.

In a Sodality of the Third Order Secular of St. Francis, the officials or Discretorium alone have the right of administering its properties.

The following three-fold proof is offered: a) that this right has always resided in the Tertiary officials from the beginning of the Order; b) that it was never legitimately transferred to the Franciscan Superiors; c) that present canon law gives this right to the Tertiary officials.

A) *This right has always resided in the officials of the Sodality.* The first Rule of the Order makes provision that the ministers, i. e. the officials, with the consent of the brethren, shall elect two other officials and a treasurer (*massarius*) who are to provide for the Tertiaries and the poor.¹²⁶ The Rule of 1289 by Nicholas IV mentions that at divine services a collection should be taken up by the treasurer, and with the consent of the officials, should be utilized by him to alleviate the sufferings of the poor as well as the sick, and to defray funeral expenses.¹²⁷ The officials shall visit the sick weekly in order to provide for their neces-

¹²⁵ *Rule*, II, §§ 12 and 13.

¹²⁶ "Ministri cum consilio suorum fratrum post annum eligant duos alios ministros et fidelem massarium qui necessitati fratrum et sororum et aliorum pauperum provideat et nuntios qui dicta factaque fraternitatis de mandato eorum nuntiet." (XII, 6.)

¹²⁷ Chap. XIII.

sities from the common funds (de bonis communibus ministrando).¹²⁸

In the *Statuta Innocentiana* the care of all moneys which may come to the Sodality is to be placed in the hands of one of the officials called a '*Syndicus*' (procurator), and is to be expended by him, subject to the wishes of the minister.¹²⁹

The same tenor is expressed in statutes and chapters of individual places; thus the Chapter of Tertiaries held at Bologna (1289) decreed that no Tertiary shall be allowed to collect any temporal goods without the permission of the ministers (officials);¹³⁰ the Statutes of the Congregation of Brescia (13th century) state that the Minister (chief official) shall, after his term has expired, turn over the goods of the community to his successor and the officials (ministro sequenti et officialibus), and render a strict account of these goods.¹³¹

Benedict XIII speaks of the deputies and officials as ad-

¹²⁸ Chap. XIV.

¹²⁹ Ad Cap. XV, s. v. *Officium Syndici*; the minister is the chief official of the Sodality and himself a Tertiary. By the minister is not meant the Franciscan Superior, for the same chapter (s. v. *Officium discretorum*) enumerates the authority of a Sodality as follows: " * * * in congregatione [Sodality according to the present canonical term] Guardiani, Ministri, Visitatoris, Discretorum, et Secretarii consistat gubernium totius Ordinis, * * *." And again the same chapter (s. v. *Officium Ministri*)—"Notandum vero: si minister sit *saecularis*, *Coadjutorem* debere esse *sacerdotem*; et e contra si Minister fuerit *sacerdos*, *Coadjutor* debet esse *saecularis*." Therefore the minister is not the Franciscan Superior. The italics in this quotation are in the Statutes.

¹³⁰ A. F. H., II, p. 69 f, § 11.

¹³¹ A. F. H., I, p. 551, n. XXI; that this minister is not a Friar Minor is also apparent from these statutes wherein the minister is enjoined to call a Friar Minor in case of discordance among the brethren. (n. X.)

ministering the funds of the Tertiary Sodality,¹²² while Leo XIII in his Rule demands that the praefecti (officials) fulfill their office of charity toward the sick and care for them in a temporary manner, i. e. provide them with temporal necessities.¹²³

B) *This right which the officials enjoyed from the very beginning of the Order was never transferred to the Franciscan Superiors.* In the beginning of the existence of the Third Order, The Friars Minor had little or nothing to do with its government *ex jure*, as can be surmised from the first Rule of the Order which does not commemorate the Franciscans in any way.¹²⁴

Gradually through papal decree and statute the Friars Minor assumed complete authority over the Tertiaries; however, this authority, although ordinary, was spiritual alone, i. e. it never extended itself to the temporal goods of a Sodality. At its inception the entire government, even including the office of visitation, was vested in the Tertiaries themselves, or by someone appointed by them who in many cases was a Friar Minor;¹²⁵ in 1234 this latter office was given to the ordinary of the place in order to free the Tertiaries from the molestations of the civil authorities.¹²⁶

The first instance of any canonical authority being conceded to the Friars Minor was in the year 1247 when Innocent IV authorized them to perform the office of visitation,

¹²² Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 285-294).

¹²³ *Rule of Leo XIII*, II, §§ 12 and 13.

¹²⁴ Cf. the *Regula Antiqua* in the appendix; the thirteenth chapter, which makes mention of the Friars Minor, was inserted around 1247 as has already been mentioned and will shortly be noted.

¹²⁵ The testimony of Bernard of Besse implies this—cf. "Liber de Laudibus", *Analecta Franciscana*, III, p. 686.

¹²⁶ Bull, *Ut cum majori*, Nov. 21, 1234 (*Bull. Franc.*, I, n. 149, p. 142 f).

to instruct in the Rule, to correct and reform the Tertiaries 'both in head and members.'¹²⁷ The Rule of Nicholas IV (1289) counsels that the Friars Minor visit and reform the Tertiary Congregations,¹²⁸ while the Statutes of the Congregation of Brescia (13th century) enjoin the Minister of the Tertiary Congregation to call a Friar Minor in case of discordance among the brethren.¹²⁹

John XXII describes the dependence of the Tertiaries as being '*sub cura et doctrina Fratrum Minorum.*'¹³⁰ To garb with the habit, receive profession, perform the office of visitation and to appoint a confessor is the extent of the jurisdiction of the Friars Minor over the Tertiaries as mentioned by Sixtus IV.¹³¹

The foregoing decrees are more or less of a negative character; but the words of Benedict XIII treat the question under consideration in a positive manner. After declaring the authority of the Friars Minor to consist in erecting Tertiary Congregations (Sodalities), receiving profession, instructing in the Rule, settling controversies, and administering to the Tertiaries in general, he gives them authority through the canonical visitor appointed by them, to examine whether the temporal goods have been properly administered, but he expressly *forbids* them to administer the same *as this is the duty of the officials of the Sodality.*¹³²

¹²⁷ Bull, *Vota devotorum*, June 13, 1247 (*Bull. Franc.*, I, n. 210, p. 464); this decree was embodied in the *Regula Antiqua* at that time under XIII, 5-6.

¹²⁸ Chap. XVI.

¹²⁹ *A. F. H.*, I, p. 549, n. X.

¹³⁰ *Orbis Seraphicus*, II, 793 f.

¹³¹ Bull, *Romani Pontificis*, Dec. 15, 1471 (*o. c.*, 893-895).

¹³² "Visitator * * * libros et rationes reddituum ac bonorum ipsarum congregationum examinare et recognoscere poterit, *quā in eorum administratione aut eleemosynarum receptione vel distributione se ingerant*, sed tantum an videlicet deputati et officiales piis operibus ac legatis, oneribusque praeftatae congregationi injunctis et impositis,

All other decrees of the Holy See in granting authority over the secular Tertiaries to the Friars Minor, always limit themselves to the spiritual subjection of the Tertiaries to them.¹²⁰

debitis modo et forma et opportuno tempore satisfaciunt. * * *"—Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 285-294).

¹²⁰ Clement X gave authority to the Capuchins and the Third Order Regular to confer the habit and to govern the Third Order according to previous legislation (*Sollicitudo Pastoralis*, Feb. 20, 1675 (*Bull. Rom.*, XVIII, 540-542)); the following is a decree of the S. C. of Bishops and Regulars, June 18, 1717, in reference to the jurisdiction of the *Patres Reformati* over the Tertiaries: "An Tertiarii sint subjecti gubernio spirituali Patrum Reformatorum in casu?" Response, "Affirmative in cernentibus *spiritualia* in ecclesia S. Antonii." (*Fontes*, n. 1834); "erigere, instituire et fundare Tertium Ordinem, * * * atque hujusmodi Tertii Ordinis professoribus * * * scapulare sive habitum cum cingulo conferre, in rebus spiritualibus dirigere, in tertia Regula beati Francisci observanda privatim et publice docere et instruere", is the extent of the jurisdiction of the Friars Minor Capuchin as given by Benedict XIII in the Bull, *Ratio Apostolici ministerii*, June 23, 1726, and by Clement XII in the Bull, *Apostolicae servitutis*, July 23, 1735 (*Bull. Rom.*, XXII, 369, § 3, and XXIV, 61, § 1, respectively); the *Rule of Leo XIII* gives authority only in those things which are spiritual (cf. Rule, chap. III); the various Bulls of Benedict XIII, Clement XII and Benedict XIV (Bull, *Laudabile*, Aug. 2, 1745—*Bull. Rom. Continuatio*, I, 547-550) have definitely settled the question of the jurisdiction of the Friars Minor over the Secular Tertiaries; hence there are no later papal decrees which treat this *ex professo*. However, there are many other more recent papal pronouncements which treat of the jurisdiction of the Friars Minor, but in none of these will the reader discover any connections which are other than spiritual: cf. Leo XIII, Encyclical, *Auspicato*, Sept. 7, 1882 (*A. S. S.*, XV, 145-153); Leo XIII, Const., *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588), the words of Leo XIII in an audience granted to the four Ministers-General of the Friars Minor and the Third Order Regular, July 7, 1883 (*A. M.*, II, 111); Pius X, Brief, *Sodalium e Tertio Ordine*, May 5, 1909 (*A. M.*, XXVIII, 174-176); Pius X, Brief, *Septimo jam pleno*, Oct. 4, 1909 (*A. A. S.*, I [1909], 725-739); Pius X, Brief, *Tertium Franciscanum Ordinem*, Sept. 8, 1912 (*A. A. S.*, IV [1912], 582-586); Pius X, Brief, *Recte vos*, Apr. 25, 1909 (*A. A. S.*, I [1909], 485-487); Benedict XV, Brief, *Sacra Propediem*, Jan. 6, 1921 (*A. A. S.*, XIII

Arguing therefore from the principle of canon 4 that the administration of the goods of a Sodality is a right which was always exercised by the officials of a Sodality and was never taken from them legitimately, this right must be upheld to the exclusion of others.

C) *Canon law gives the Tertiary officials the right of administering the goods of a Sodality.* All associations legitimately erected may possess as well as administer properties,¹²⁴ and if the association is a moral person, that person itself is the subject of its temporalities,¹²⁵ which necessarily comes under the heading of ecclesiastical goods.¹²⁶ Since a moral person is equal to a minor,¹²⁷ it is necessary that it act through individuals as administrators, whom the members of a moral person have the right to elect.¹²⁸ These are known by the common term of officials in Sodalities of the Third Order Secular.

Consequently the Franciscan Superior or his delegate as head of a local Sodality, has no direct part in the administration of its funds but nevertheless has the right of vigilance regarding their disposal; this office of vigilance is also to be exercised at the time of the canonical visitation.¹²⁹

The following points are to be observed regarding the goods of a Sodality: a) alms may be collected and used for

[1921], 33-41); Benedict XV, Brief, *Terti Ordinis a poenitentia*, Feb. 20, 1921 (A. A. S., XIII [1921], 130 f); Pius XI, Const., *Rite expiatis*, Apr. 30, 1926 (A. A. S., XVIII [1926], 153-175).

¹²⁴ Can. 691, § 1.

¹²⁵ Can. 1499, § 2; "Subjectum bonorum ad associationes juridica persona gaudentes, residet in ipsa persona morali."—Cocchi, *Commentarium*, IV, n. 177.

¹²⁶ Can. 1497, § 1.

¹²⁷ Can. 100, § 3.

¹²⁸ Can. 697, § 1; 1495, § 2.

¹²⁹ Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8, (*Bull. Rom.*, XXII, 285-294).

pious purposes, but the will of the donors must be complied with;¹⁴⁰ b) the permission of the ordinary of the place where the Sodality is erected must be obtained,¹⁴¹ and if alms are to be collected outside of the diocese where the Sodality is situated, the permission of the ordinaries of both places must be obtained in writing;¹⁴² c) although the temporal goods of a Third Order Sodality are subject by papal decree to the vigilance of the Friars Minor,¹⁴³ nevertheless the ordinary of the place has the right to demand an annual account of their disposal.¹⁴⁴ d) on the contrary, donations prescribed by the Rule¹⁴⁵ which are to be made by the Tertiaries themselves for a common fund to be used for the poor and sick members, refer to the *internal discipline* of the Sodality, concerning which the ordinary of the place has no right of vigilance.¹⁴⁶ e) the administrators of Tertiary property cannot take part in court procedure concerning the same without the permission of the ordinary of the place.¹⁴⁷

§ 6. The Canonical Visitation.

Too much stress cannot be placed on the importance of this office, for just as bishops are required canonically to visit the various institutions of their dioceses in order to correct abuses which may have crept in, and to promote

¹⁴⁰ Can. 691, § 2.

¹⁴¹ Can. 691, § 3.

¹⁴² Can. 691, § 4.

¹⁴³ Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 285-294).

¹⁴⁴ Can. 691, §§ 1 and 5; 1525.

¹⁴⁵ *Rule of Leo XIII*, II, § 12.

¹⁴⁶ Can. 690, § 2; this refers equally as well to Sodalities erected outside of Franciscan churches and convents, for the Friars Minor have the right of governing these Sodalities in regard to their internal affairs, as has been stated above in § 3 of this Article.

¹⁴⁷ Can. 1526; Vermeersch-Creusen, *Epitome*, II, n. 848.

discipline,¹⁴⁰ so also are the Franciscan Superiors required to keep vigil over the various Tertiary Sodalities under their jurisdiction—which vigil is best observed by the canonical visitation prescribed by Leo XIII.¹⁴¹

*“Visitatores ex Primo Franciscalium Ordine, vel Ordine Tertio Regulari legantur, quos custodes seu Guardiani, si id rogati fuerint, designabunt. Visitatoris munere laicis viris interdictum esto.”*¹⁴²

The Rule indicates that the Minister-General or the Provincial—which would be more practical—should designate the visitor who would thus enjoy faculties to visit all Sodalities which have been erected under his jurisdiction. The words of the Rule quoted above, in speaking of the Guardian designating the visitor, adds this significant clause: *si id rogati fuerint*; but the same Rule demands that this visitation should be made yearly,¹⁴³ and therefore it is not a matter of choice on the part of the Guardian. Ordinarily then, the Visitor should be designated by the Provincial, extraordinarily by the Guardian. This solution also has its practical value: visitation primarily tends toward the correction of abuses and the promotion of harmony both between the Tertiaries themselves, as also between the Tertiaries and their Director—an office which of its nature requires tact and experience which would hardly be acquired by the visitation of one or two Sodalities of a Guardianship. This view is further strengthened by the fact that Leo XIII, although prescribing annual visitation, adds that if necessity demands, it can be made more often.¹⁴⁴ Therefore ordinarily the visitor is the dele-

¹⁴⁰ Can. 343; 346.

¹⁴¹ *Rule of Leo XIII*, III, § 2.

¹⁴² *Ibidem*, § 3; the italics belong to the Rule.

¹⁴³ *Ibidem*, § 2—*in singulos annos*.

¹⁴⁴ *Ibidem*—“eoque crebrius, si res postulaverit”.

gate of the provincial, and if necessity demands, inter-annual visitation may be instituted by the Guardian, *si id rogati fuerint*, i. e. if the Director or the officials of the Sodality deem it expedient and request the Guardian to appoint an extraordinary visitor.¹²²

The visitors are to be chosen from among the Friars Minor,¹²³ and rightly so: for since the Third Order is under their authority, it is entirely in conformity with the principles of jurisdiction that visitation, which is an essential part of the government of any ecclesiastical institution, should be made by those who enjoy that authority. However, due to the fact that Leo XIII positively excludes only lay persons from this office,¹²⁴ there is no reason to suppose that a secular priest or another religious priest could not be delegated, especially in isolated places where a Franciscan priest could not easily be obtained; this necessarily postulates a knowledge of the principles and purpose of the Third Order on the part of a priest thus delegated; otherwise the very purpose of the visitation would be frustrated. Prudence, as well as the welfare of the Tertiaries and their local organization demand that a priest should not be Director and visitor of the same Sodality.

The office of visitation is described in the following words by the *Rule of Leo XIII*: "Curator qui *Visitor* audit, diligenter quaerat, satisne salvae leges. Ejus rei ergo, sodalitorum sedes in singulos annos, eoque crebrius, si res postulerit, pro potestate circumeat, coetumque habeat, Praefectis¹²⁵ sodalibusque universis adesse jussis. Si quem

¹²² The *Constitutiones O. M. Conv.*, Cap. XI, Tit. III, n. 11 urge the provincial also to visit the Tertiary Sodalities at the time of his annual visitation of the religious of the First Order.

¹²³ *Rule of Leo XIII*, III, § 3.

¹²⁴ *Ibidem*—"Visitatoris munere laicis interdictum est".

¹²⁵ I. e. officials.

Visitator ad officium monendo jubendo revocarit, sive quid, salutaris poenae nomine, in quemquam decreverit, hic mōdeste accipiat, idemque luere ne abnuat.”¹²⁷

His duty being therefore to inquire as to whether the Rules of the Third Order and the statutes of the local organization are observed; for non-observance he may give salutary punishment; he may also dispense from prescriptions of the Rule in individual cases;¹²⁸ he is also to inquire regarding the administration of the funds of the Sodality by its officials.¹²⁹

From the words of the Rule it is evident that the office of visitation is not to be taken lightly, and either neglected or fulfilled at the whim of the Franciscan Superiors; it is to be made yearly and more often if the occasion requires. In this it is also to be remembered that since a Sodality of the Third Order is a moral person, its officials may demand visitation if the Friars Minor are neglectful in this regard, and especially so, because this is one of the chief Rules of the Order. That annual visitation is a duty which devolves upon the Franciscan Superiors even in isolated places is also apparent from the *Statuta Innocentiana*.¹³⁰

The Ordinary of the place regarding visitation. The ordinary of the place has no right of visitation or vigilance in regard to the Rule and internal discipline of Tertiary So-

¹²⁷ III, § 2; the italics are in the Rule.

¹²⁸ *Ibidem*, § 6.

¹²⁹ Benedict XIII, Bull, *Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8 (*Bull. Rom.*, XXII, 285-294).

¹³⁰ “Itaque in pagis poterunt fratres, et sorores sollicitare, ut aliquis sacerdos petat a p. Guardiano suam auctoritatem, in ordine ad illis assistendum, sicut assistit Visitator religiosus in Civitatibus ubi sunt Conventus. Poterunt similiter facere suas Congregationes, et electiones officiorum. *Nihilominus ad Visitatorem Regularem pertinet semper singulis annis visitare fraternitates Tertii Ordinis, quae fuerint per totam Guardianiam, si ipse Guardianus nolit facere.*” (ad Cap. XVI).

dalities, no matter whether they have been erected in the churches of the Friars Minor,¹⁴¹ or in other places with the delegation of the Franciscan Superiors.¹⁴² He has the right of visitation or of demanding an annual account of the administration of the goods of a Sodality,¹⁴³ not however those funds which are collected from the Tertiaries themselves through the obligation of the Rule, as this refers to the internal discipline of a Sodality. If the Tertiaries are assigned a separate chapel in a church of the Friars Minor, the ordinary of the place may visit in regard to the upkeep of its altar, i. e. in those things which entail the administration of funds.¹⁴⁴ He has the right of examining the books regarding the obligations of Masses which by chance the Tertiaries may have.¹⁴⁵ If a Tertiary Sodality is erected in an oratory which belongs to them, this oratory not being exempt, is subject to the visitation of the ordinary of the place in the same manner as other non-exempt institutions of the diocese.¹⁴⁶ The Sacred Consistorial Congregation in its *Ordo Servandus in relatione de statu ecclesiarum*, places upon the ordinary of the place the obligation of ascertain-

¹⁴¹ Can. 690, § 2; *S. C. of Indulgences*, Jan. 31, 1893, ad III (A. S. S., XXV, 506-509).

¹⁴² These latter Sodalities enjoy the apostolic privilege of which can. 690, § 1, speaks: Benedict XIII, Bull, *Paterna Sedes Apostolicae*, § 8 (*Bull. Rom.*, XXII, 285-294); Cf. *Causa Sypontina*, decided by the *S. C. of Bishops and Regulars*, March 10, 1893 (A. S. S., XXVI, 238-247); this is evident from the fact that it has been proven that the Friars Minor have full rights regarding the discipline and spiritual care of Sodalities no matter where they have been erected.—cf. above § 3 of this article.

¹⁴³ Can. 691, § 5; 1525; *Concil. Trident.*, Sess. XXII de reformat., cap. 8-9.

¹⁴⁴ *S. C. of the Council*, June 23, 1719 (Benedict XIV, *Institutiones Ecclesiasticae*, CV, LXXXVII); *Concil. Trident.*, l. c.

¹⁴⁵ *Piat, Praelectiones Juris Regularis*, II, Q 78.

¹⁴⁶ Can. 344, § 1.

ing the existence of Tertiaries in the diocese; whether they give a good example to the other faithful; he is also to exercise vigilance as to whether those who are notoriously addicted to a heretical sect are received into the Third Order, and if so, what means are taken to avoid this evil.¹⁶⁷

§ 7. Summary of the Rights of Franciscan Superiors toward Sodalties.¹⁶⁸

The Ministers-General in the whole world, the Provincial and local Superiors in their respective territories, to the exclusion of others, enjoy the following rights and privileges which may be exercised either through themselves or others:¹⁶⁹

a) To erect Sodalties after having received the written consent of the ordinary of the place; to invest with the habit and receive the profession of novices after having received the vote of the officials of the Sodality, although this latter is certainly not necessary for the validity of these acts. b) The very nature of their office demands that they instruct the novices and Tertiaries in the Rule of the Order and its obligations. c) To call the various meetings prescribed in the Ceremonial,¹⁷⁰ and preside over them,

¹⁶⁷ Dec. 31, 1909, nn. 134 f (*A. A. S.*, II [1910], 32).

¹⁶⁸ Many of these points have already been thoroughly treated; hence proofs will only be adduced for those which have not been mentioned before.

¹⁶⁹ Can. 199, § 1.

¹⁷⁰ *The Rule of Leo XIII*, II, § 11, states that the prefect shall call these meetings; the term 'prefect', when applied to the Franciscan Superiors is usually prefixed with the word 'ordinarius' (cf. *Rule*, III, § 6); it would seem therefore that this calling of the various gatherings is the office of one of the lay officials of the Sodality. The meaning of the term therefore is not fully clear, but in view of the fact that Benedict XIII (*Bull. Paterna Sedis Apostolicae*, Dec. 10, 1725, § 8—*Bull. Rom.*, XXII, 285-294) expressly gave this authority to the Fran-

as well as over the monthly meetings of the officials; they also preside at the elections of officials of the Sodality, and as head of the chapter, confirm the elections. d) To correct delinquents for transgressions against the Rule, and after a third unheeded admonition, to expel them from the Order. e) To dispense from prescriptions of the Rule in individual cases for a just and grave cause: this authority comprehends dispensations from fasts, prayers and attendance at monthly meetings as prescribed in chapter III of the Rule; commuting in *particular* cases, the wearing of the scapular into a medal, although a *general* commutation is forbidden.¹⁷¹ They cannot dispense with the period of the novitiate either in whole or in part, except in danger of death. f) To convoke conventions of the Tertiaries and preside at them according to the following norms: if from a district, the local Superior; if from a province, the Provincial; if from many provinces, the Minister-General. The Superiors of the Third Order Regular are excluded by positive law from this privilege.¹⁷² g) To perform the canonical visitation. h) The Franciscan Superiors have the right to impart the papal blessing, and the blessing with plenary indulgence.¹⁷³

ciscan Superiors, until it is expressly proven otherwise, there is no reason to digress from this practice. Certainly these meetings cannot be called without the authority of the Director.—cf. *S. C. of Indulgences*, Jan. 30, 1896, ad VI (*M. E.*, 9, Ser. I, vol. IX, 153).

¹⁷¹ *Rule*, III, § 6; I, § 3; *S. C. of Religious*, March 25, 1922 (*A. A. S.*, XIV [1922], 353 f).

¹⁷² "Religiosi dumtaxat ex Ordine Primo coetus seu conventus sodalium Ordinis Tertii cogant iisdemque praesideant; si sodales a districtu coeant, coenobii custos seu *Guardianus*; si e provincia, provincialis Minister; si e pluribus provinciis, Ordinis Minister generalis."—Pius X, Brief, *Tertium Franciscalum Ordinem*, Sept. 8, 1912 (*A. A. S.*, IV [1912], 585, I); the italics are in the Brief.

¹⁷³ The various phases of these blessings will be explained later.

CHAPTER IX

Privileges and Indulgences of the Franciscan Third Order Secular.

ARTICLE I.

The Right of Precedence.

Sodalities of the Third Order Secular of St. Francis enjoy precedence over all lay associations, when they proceed collegiately under the cross or banner proper to the Sodality.¹ This privilege also extends to processions of the Blessed Sacrament in which the confraternity of the Blessed Sacrament takes part.²

The right of precedence depends on their observance of proceeding collegiately with the cross or other proper insignia, and on their being clothed with the full habit of the Order, i. e. a garment comprehended in the Italian word *sacco*;³ that the word *sacco* has reference to the total garment or habit is clear from another decision of the S. C. of Rites which states that this *sacco* is an entire garment

¹ Can. 701; 706; *S. C. of Rites*, May 28, 1886; July 4, 1887; March 27, 1893; March 1, 1894; March 27, 1897; Nov. 30, 1897; Feb. 18, 1899; Nov. 10, 1905 (*Decreta Authentica S. C. R.*, nn. 3664, 3678, 3795, 3819, 3951, 3968, 4012, 4173, respectively).

² *Ibidem*; cf. Ferreres, *Le Confraternite*, n. 444.

³ " * * * tunc solummodo habere jus precedentiae in Processionibus, cum iidem collegialiter incedunt sub propria cruce ac veste uniformi induti, vulgo *sacco*."—*S. C. of Bishops and Regulars*, Apr. 6, 1900 (*Fontes*, n. 2038); cf. can. 706.

(vestem integram vulgo saccum);⁴ surely the small scapular and cord which is ordinarily worn by the Tertiaries⁵ would not be comprehended in this description. Hence if the Tertiaries do not proceed collegiately or do not wear the habit, they do not enjoy right of precedence; therefore since they are obliged to proceed collegiately it is evident that this right does not belong to the Tertiaries as *individuals*, but rather as a body and consequently it is necessary that the Sodality be canonically erected as will shortly be seen.

What if neither the Tertiaries nor the members of other lay associations in procession wear the full garment? In this event the Tertiaries nevertheless enjoy the right of precedence, but they are exhorted to wear the full habit in procession.⁶

Franciscan Tertiaries may also march in procession with the Friars Minor under the cross of the latter.⁷

Among Sodalities of the same or a different Order, the right of precedence is enjoyed by that Sodality which is in quasi-possession of the same,⁸ and if this is not clear, by that Sodality which was first canonically erected in the place.⁹ In the event of controversy, the ordinary of the place decides questions of precedence;¹⁰ his consent is also required if the Tertiaries wish to wear a special garb. Ter-

⁴ Nov. 10, 1905 ad I (*Decreta Authentica S. C. R.*, n. 4173).

⁵ Cf. *Rule of Leo XIII*, I, § 3.

⁶ *S. C. of Rites*, Nov. 10, 1905, ad I (*Decreta Authentica S. C. R.*, n. 4173).

⁷ Benedict XIII, Bull, *Paterna Sedis Apostolicæ*, Dec. 10, 1725, § 9 (*Bull. Rom.*, XXII, 285-294); *S. C. of Bishops and Regulars*, Aug. 25, 1893, ad II (*A. S. S.*, XXVI, 497 f).

⁸ Can. 106, 5°.

⁹ *Ibidem*; *S. C. of Rites*, March 1, 1894 (*Decreta Authentica S. C. R.*, n. 3819).

¹⁰ Can. 106, 6°.

tiaries may also take part in public processions, funerals, etc., without proceeding collegiately; in this event, as has been noted above, they do not enjoy any right of precedence.²²

The right to march in procession so that precedence may be enjoyed, is gained either through custom or invitation; hence a newly erected Tertiary Sodality must first prove its right to take part in a given procession before it can claim precedence in the same.²³

Third Order Sodalities are not mentioned among those who are obliged to attend the yearly Corpus Christi procession from the principal church of the city: hence they are not obliged to attend this procession.²⁴

ARTICLE II.

Indulgences of the Third Order Secular of St. Francis.

The Holy See has always been most generous in the large number of indulgences and other spiritual privileges she has always granted to the Third Order of St. Francis. It is not the purpose to enumerate them here, but rather to give the principal means of guidance in determining which indulgences accrue to Tertiaries and by what means they are available. Two of the more important ones will be given specifically.

§ 1. Sources of Indulgences.

By reason of their concession, indulgences and spiritual privileges are of a two-fold nature: those granted directly and those granted by communication. Therefore a distinc-

²² Can. 703, § 3; 706.

²³ Gennari, *M. E.*, 4, Ser. III, vol. XXIV, 377, n. 34.

²⁴ Can. 1291, § 1.

tion must be drawn regarding those indulgences which are granted directly to the Third Order Secular of St. Francis, and those which are indirectly granted through the communication with the First Order and the Third Order Regular. The distinction must also be borne in mind between those granted to the Third Order as a whole, and those granted to Sodality of the Third Order, for it is evident that a Tertiary who does not belong to a Sodality cannot take part in the special indulgences and privileges which are available to members of a Sodality, e. g. attendance at the monthly meetings of the Sodality.¹

The communication of Pius X. Pius X, wishing to en-

¹ Cf. List of Indulgences attached to the *Rule of Leo XIII*, II, 2; above, p. 125-127. According to canon 692, one must be validly received into an association in order to partake in its indulgences and privileges. All authors treating on this legislation which existed both before and after the Code definitely assert that Tertiary novices belong to the Third Order in a manner which is sufficient for them to partake in its indulgences and privileges: and the more so, since the *Ceremonial of the Third Order* (Art. III) prescribes a definite mode of reception and registration. These commentators also logically deduce an analogy from canon 567, § 1, which gives this privilege to religious novices, and hence this can safely be asserted. However, just as *religious* novices cannot partake in those rights which are enjoyed only by *professed* members of a religious Institute (Vermeersch-Creusen, *Epitome*, n. 667), so also are the temporal rights of *Tertiary* novices restricted so that they have no right to partake in elections, receive offices in a Sodality, and in general concern themselves with the government of a Sodality, for Tertiary novices alone could not form a moral person known as a *Tertiary* Sodality, in the same manner as religious novices cannot form a *domus formata* (Can. 488, 5°): that they cannot concern themselves with the government and elections is also evident from the fact that the offices in a Sodality last for a period of three years (*Rule of Leo XIII*, III, § 1) while a Tertiary novice, as a novice, exists for only one year (*Ibidem*, I, § 1). Cf. Tischler, *Handbuch zur Leitung des Dritten Ordens*, p. 125; Holzapfel, *Die Leitung des Dritten Ordens*, p. 92; Tachy, *Les Tiers Ordres*, n. 64; Cerri, *Il Ters' Ordine Francescano*, p. 58; Mileta, *Trattato Giuridico sul Ters' Ordine Francescano*, p. 34.

rich the Third Order with many spiritual favors granted 'perpetually that all Franciscan Tertiaries, no matter of what sex or institute, participate both in life and in death in all favors granted through pontifical indulgence to the First and Second Order, as also in all the spiritual benefits derived from the good works of the latter.'³

Some doubt arose as to whether this communication was only between Tertiaries and those with whom they were affiliated, or between all Tertiaries and all religious of the First and Second Order. This doubt was cleared by a rescript of the same pontiff in which he states that the communication is reciprocal 'quatenus laudata Indulgentiarum et spiritualium fructuum mutua communicatione perfrui in perpetuum possint, quotquot sub Patriarche Seraphici S. Francisci vexillo militant ad quemcumque Ordinem vel Ordinis Familiam pertineant.'⁴ From the tenor and words of the communication, it is clear that it is a communication *a jure*, and *in forma accessoria*.⁴

It is to be noted that this communication extends only to *indulgences* and not to *indults*, and therefore although through this communication Tertiaries have the right of receiving the blessing with plenary indulgence on the same days as it is imparted to the Franciscan Religious (the more proper term for that given to religious is General

³ " * * * statuimus in perpetuum, ut quibus pontificalis indulgentiae donis fruuntur quosque de bonis operibus spirituales fructus percipiunt familiae seraphicae Primi et Alterius Ordinis, ea omnia Tertiarii Franciscuales quotquot sunt utriusque sexus et cujusvi instituti, vitae mortisque tempore participant."—Brief, *Sodalium e Tertio Ordine*, May 5, 1909 (*A. M.*, XXVIII, 174-176).

⁴ May 17, 1909 (*o. c.*, 177); both concessions were approved and declared authentic by the Congregation of the Holy Office, Dec. 20, 1910, and Jan. 18, 1911 (*o. c.*, XXX, 242 f).

⁴ Cf. can. 65; *S. C. of the Holy office*, June 8, 1916, ad V (*A. A. S.*, VIII [1916], 264).

Absolution), nevertheless the Tertiaries cannot partake in the *indult* which the Franciscan religious enjoy of receiving this blessing on certain special days due to communication between the Families of the First Order; the reason for this is that Tertiaries participate in the *indulgences* of the other Franciscan Families, not in the *indults*.¹

This communication is not only personal, but also local, so that churches and oratories belonging to secular Tertiaries enjoy the same indulgences as were granted to the First and Second, and the Third Order Regular in favor of the faithful who visit them on certain days.² A church or oratory where a Tertiary Sodality is situated, even though it does not properly belong to the Tertiaries, enjoys the same indulgences in favor of the Tertiaries visiting it, as those directly granted to Franciscan churches of the First and Second, and the Third Order Regular.³

The plenary indulgence granted to all Tertiaries who visit a church of the First Order on the feast of 'All Souls of the Order', can be gained only once yearly. The communication of Pius X is not to be understood that it can be gained by the Tertiaries on the different dates this feast is celebrated in the various Families of the First Order.⁴

Both by means of direct concession and through the communication of Pius X, the following are the principal sources of Indulgences which are available to Franciscan Tertiaries: The indulgences and privileges attached to the Rule of Leo XIII; (direct concession)⁵ a Summary of Indulgences pertaining to the Seraphic Order, approved by

¹ Cf. Stein, *Tertius Ordo Franciscalis*, p. 76.

² *S. C. of the Holy Office*, June 8, 1916, ad I (A. A. S., VIII [1916], 263 f).

³ *Ibidem*, ad II.

⁴ *Ibidem*, ad III.

⁵ Given in the Const., *Misericors Dei Filius*, May 30, 1883 (*Fontes*, n. 588).

the S. C. of Indulgences July 20, 1841; (both direct concession and through communication),¹⁰ the Summary approved by the same Congregation, Sept. 11, 1901; (direct concession),¹¹ the Summary of Indulgences and Privileges approved for the Friars Minor Capuchin, June 23, 1905 (direct concession and through communication);¹² the indulgences contained in the Brief, *Qui multa*, of Leo XIII, Sept. 7, 1901.¹³

The small habit consisting of scapular and cord must be continually worn by the Tertiaries as a *conditio sine qua non* of gaining the indulgences and privileges of the Order; therefore during the time that they are not wearing these, they cannot partake in the indulgences and privileges: as soon as they reassume the scapular and cord, they automatically reassume these rights and privileges.¹⁴ The Franciscan Superiors (and their delegated Director) may commute the wearing of the scapular into a medal so that Tertiaries wearing

¹⁰ This may be found in Mocchegiani, *Collectio Indulgentiarum*, n. 1501; but the same Congregation, June 25, 1904, declared that this summary needed revision (Stein, *o. c.*, p. 77); hence care must be exercised in its use.

¹¹ This may be found in: *M. E.*, 3, Ser. II, vol. XIII, 391-397; Mocchegiani, *Jurisprudencia Ecclesiastica*, II, p. 443-449; Fleming, *Leonis XIII Acta ad III Ordinem Spectantia*, p. 229-235.

¹² A. S. S., XXXVIII, 42-57; *M. E.*, 7, Ser. II, vol. XVII, 498-509; *Summarium Indulg. Privil. et Indult. Capucinatorum*, Rome, 1905; *Analecta O. M. Cap.*, XXI, 228-235.

¹³ *A. M.*, XX, 152-157.

¹⁴ "Adlecti in sodalitatem scapulare parvum unaque cingulum de more gerant: ni gesserint, statim privilegiis juribusque careant." (*Rule of Leo XIII*, I §3); *S. S. of Indulgences*, May 27, 1857 (*Decreta Authentica S. C. Indulg.*, n 379); June 10, 1886 (*A. S. S.*, XIX, 44 f); this is a condition which the *Rule of the Third Order* mentions of those who belong to a *Sodality*: *a pari* the same is true of those who belong to the Third Order as a whole, for the scapular is not an insignia of a *Sodality* but of the Franciscan Third Order Secular as a whole.

such a medal partake of all the indulgences and privileges of the Order; this may be done only in individual cases, and a general commutation is forbidden." The general observance of the Rules of an association is not a necessary requisite for participation in its indulgences and privileges, except in those things which are expressly mentioned."

§ 2. Papal Blessing with Plenary Indulgence

According to the concession of Leo XIII, this blessing may be imparted to the Tertiaries twice a year;" it is not to be given on the same day or in the same place, i. e., in the same town or city in which the bishop imparts it."

Under pain of invalidity, this blessing can be given only in the churches of the Regulars who have the authority to impart it, and in the Churches of the Tertiaries who are aggregated to these Regulars;" this latter is to be understood as the church or chapel where the Tertiary Sodality is canonically erected."

¹⁰ *S. C. of Religious*, March 25, 1922 (*A. A. S.*, XIV [1922], 353 f).

¹¹ Can. 692; cf. the declaration of the *S. C. of Indulgences*, Jan 25, 1842, ad II (*Decreta Authentica S. C. Indulg.*, n. 298).

¹² List of Indulgences attached to the Rule, I, § 3.

¹³ Can. 915; Vermeersch-Creusen, *Epitome*, II, n. 209.

¹⁴ *Ibidem*.

¹⁵ a) This latter interpretation is entirely in harmony with canon 18 which states that in case of doubt the mind of the legislator should be sought: the majority of Tertiary Sodalities, if not erected in the Churches of the Friars Minor, are erected in secular or other regular parishes which do not belong to the Tertiaries; the mind of the legislator does not seem to be that these Tertiaries are to be deprived of the privilege of this blessing. b) The words of canon 915 'in ecclesiis Tertiariorum', do not forbid this interpretation as would the words 'in propriis ecclesiis Tertiariorum', for when the Holy See wishes the latter interpretation to be put on its words, it expressly states 'in propriis ecclesiis' or uses words similar to that effect which have not been used in the present instance: cf. *S. C. of the Holy Office*, May 28, 1914 (*Fontes*, n. 1297); the same Congregation, June 8, 1916, ad

Since the Superiors of the Friars Minor enjoy ordinary jurisdiction over the Tertiaries in spiritual matters, it is apparent that they can delegate the authority of giving the papal blessing to other priests: especially is this understood to be given to the Director. They can delegate any priest of the Order to give this blessing in their churches, even though this priest be not approved for confessions;²⁸ since no sacramental jurisdiction is required for imparting this blessing, it does not seem to be forbidden to delegate this faculty even to a priest outside of the Order who is not approved for confessions.

The papal blessing can be given only when the Tertiaries are congregated together;²⁹ the formula of Benedict XIV must be used under pain of invalidity.³⁰

Directors of Tertiary Sodalties have the authority of giving this blessing without any further delegation on the part of the Franciscan Superiors;³¹ they receive the benefit of the papal blessing at the same time as they impart it to the Tertiaries, provided they are legitimately impeded from receiving this blessing from another priest (with the required faculties) on the days prescribed, and that they ful-

I-II (A. A. S., VIII [1916], 263 f). c) The Congregation of Indulgences has declared that the place for receiving this blessing is that place where the Sodality is canonically erected (Sept. 11, 1905, ad III (*M. E.*, 3, Ser. II, vol. XIII, 396), therefore since this privilege has not been expressly revoked by canon 915, it still retains its force (Can. 4).

²⁸ *S. C. of the Holy Office*, May 28, 1914 (*Fontes*, n. 1297; A. A. S., VI [1914], 347).

²⁹ Benedict XIV, Const., *Exemplis praedecessorum*, March 19, 1748 §§ 9-10 (*Fontes*, n. 386); *Ceremonial of the Third Order*, Art. VIII.

³⁰ Leo XIII, Brief, *Quo Universi*, July 7, 1882 (*Fontes*, n. 586; *Decreta Authentica S. C. R.*, n. 2550); *S. C. of Indulgences*, March 22, 1879, ad VI (*Decreta Authentica S. C. Indulg.*, n. 444); this formula is given in the *Ceremonial of the Third Order*, l. c.

³¹ *Ceremonial of the Third Order*, l. c.

all the other necessary conditions."²² In the event that Tertiaries are living in a place where no Sodality is canonically erected, they may receive the blessing with plenary indulgence in place of the papal blessing."²³ Tertiary priests who are impeded from attending at the papal blessing, may receive it on any day within the octave of the feast for which it is prescribed."²⁴ Tertiaries can receive this blessing either from their proper Director, or from a Director of a Sodality which is under the jurisdiction of a Franciscan obedience different from their own Sodality."²⁵

The conditions for acquiring the plenary indulgence attached to this blessing are the following: confession, communion, and prayers according to the intention of the Roman pontiff."²⁶

§ 3. The Blessing with Plenary Indulgence

In addition to the days on which this blessing may be imparted to the Tertiaries by direct concession, through the communication of Pius X, Tertiaries have the privilege of receiving this blessing on the same days on which general absolution is granted to the Franciscan Religious Families. The blessing which is applied to the latter however has the added effect of absolving from censure, while that given to the Secular Tertiaries is simply a blessing with plenary indulgence. Hence the former is correctly termed general

²² *S. C. of Indulgences*, July 14, 1900 (*M. E.*, 2, Ser. II, vol. XII, 349 f).

²³ *S. C. of Indulgences*, Sept. 11, 1901, ad III (*o. c.*, 3, Ser. II, vol. XIII, 396).

²⁴ *S. C. of Indulgences*, Feb. 11, 1903 (*A. S. S.*, XXXV, 636 f); this seems to be the only instance where this blessing is allowed to be given outside of the prescribed time and without the Tertiaries being congregated together.

²⁵ *S. C. of Indulgences*, Jan. 30, 1896, ad III (*M. E.*, 9, Ser. I, vol. IX, 153).

²⁶ List of Indulgences attached to the *Rule of Leo XIII*, I, § 8.

absolution, and the latter, a blessing with plenary indulgence, although both terms are promiscuously used in referring to the privilege of the Tertiaries;¹² but from the words of the formula it is evident that this promiscuous use of the term is inaccurate.¹³

This blessing is to be given by the Franciscan Superiors or by those delegated by them; the Director of a Sodality has this authority *ex officio* without any delegation.¹⁴ The Franciscan Superiors can delegate any priest of their Order to give this blessing in their churches, even though he be not approved for confessions.¹⁵ There seems to be no reason why it could not also be given to a priest outside of the Order who is not approved for confessions. In the event that the Tertiaries are congregated for the blessing and the priest with the required faculties does not appear, any priest whether regular or secular who is approved for hearing confessions, may impart the blessing.¹⁶

Ordinarily the blessing is to be given publicly, i. e., the Tertiaries being congregated together,¹⁷ by a priest vested in violet stole¹⁸ using the formula beginning with the words 'Intret oratio mea' under pain of invalidity.¹⁹

¹² Cf. *S. C. of the Holy Office*, Dec. 15, 1910 (*Fontes*, n. 1289); May 28, 1914 (*o. c.*, n. 1297); List of Indulgences attached to the Rule of Leo XIII, I, § 8; *S. C. of Indulgences*, March 22, 1842, ad I (*Decreta Authentica S. C. Indulg.*, n. 444).

¹³ Cf. *Ceremonial of the Third Order*, Art. IX.

¹⁴ *S. C. of Indulgences*, July 14, 1900 (*M. E.*, 2, Ser. II, vol. XII, 350).

¹⁵ *S. C. of the Holy Office*, May 28, 1914 (*Fontes*, n. 1297).

¹⁶ *S. C. of the Holy Office*, Dec. 15, 1910 (*o. c.*, 1289).

¹⁷ *S. C. of Rites*, Dec. 22, 1905 (*Decreta Authentica S. C. R.*, n. 4176); *S. C. of Indulgences*, July 21, 1888 (*M. E.*, 5, Ser. I, vol V, 153).

¹⁸ *S. C. of Rites*, Dec. 22, 1905, l. c.

¹⁹ Leo XIII, Brief, *Quo Universi*, July 7, 1882 (*Fontes*, n. 586); *S. C. of Rites*, June 17, 1919, ad II (*A. M.*, XXXVIII, 230).

When Tertiaries are present at the time the general absolution is given to the Franciscan Religious in a church or oratory under the formula '*Ne reminiscaris*,' they receive the benefit of the plenary indulgence and also the absolution from censure. In the same manner, Franciscan Religious who are grouped together with the Secular Tertiaries at the time that the blessing with plenary indulgence is imparted to the Tertiaries under the formula '*Intret oratio mea*', also gain the effect of a plenary indulgence with absolution from censure."

The blessing may be received from a Director who is of a different obedience than that to which one's Sodality is subject;" directors who are legitimately impeded from receiving this blessing from another priest on the days prescribed, receive the benefit of the blessing in the act of imparting it to the Tertiaries, provided they fulfill the other conditions;" the blessing may be given publicly or privately on any day of the octave of the feast for which it is assigned," privately also on the day before the feast." This

" Prescribed by Leo XIII, l. c.

" *S. C. of Rites*, June 7, 1919 (*A. M.*, l. c.).

" *S. C. of Indulgences*, Jan. 30, 1896, ad III (*M. E.*, 9, Ser. I, vol. IX, 153).

" *S. C. of Indulgences*, July 14, 1900 (*M. E.*, 2, Ser. II, vol. XII, 349).

" Benedict XV, Apr. 14, 1917 (*A. A. S.*, IX [1917], 262); this decree does not abrogate the one immediately preceding or render it useless; the concession of being able to receive the blessing either publicly or privately within the octave of the feast for which it is assigned is a privilege in favor of the *individual* and therefore does not need to be employed (can. 69). Hence since the later decree does not revoke the former, a priest who is legitimately impeded from receiving this blessing from another on the day prescribed for the blessing, may refuse to avail himself of the privilege of the octave and receive the effect of the blessing in the act of imparting it to the Tertiaries. Besides it may

blessing in private may be given by any priest approved for confessions, but must be imparted in a place approved for the hearing of confessions," although it is not necessary that the blessing be immediately connected with the sacrament."

The place for imparting this blessing privately is to be understood according to canons 908-910: the proper place for hearing confessions is in a church, or at least a semi-public oratory; confessions of men may also be heard in private homes; the confessional for women should always be in an open and conspicuous place, and generally in a church, or at least a public or semi-public oratory, with a firmly fixed perforated screen between the penitent and the confessor; the confessions of women should not be heard outside of these places except in case of infirmity or some other necessity, always observing the safeguards which the ordinary of the place may prescribe. Since the blessing with plenary indulgence is to be given privately in the place for hearing confessions, these prescriptions of the Code should be applied in the same manner.

The formula for imparting this blessing both publicly and privately is contained in the *Ceremonial of the Third Order*, Art. IX and in the appendix ad *Rituale Romanum*, 135*f.

happen in rural districts that a Director may not find the opportunity of receiving this blessing from another priest even within the octave.

"S. C. of Indulgences, July 21, 1888 (*M. E.*, 5, Ser. I, vol. V, 153); S. C. of the Holy Office, June 12, 1913 (*A. A. S.*, V [1913], 306 f)

"S. C. of Indulgences, July 21, 1888, l. c.; Jan. 30, 1896, ad I-II (*M. E.*, 9, Ser. I, vol. IX, 152 f).

"The decree of 1888 states that it is to be given 'post expletam confessionem'; however confession is necessary for the valid reception of the indulgence (List of Indulgences attached to the Rule of Leo XIII, I), and therefore the Congregation is only repeating one of the conditions already stipulated, i. e. that confession is necessary. The decree of 1906 omits any mention of confession, and only repeats that it must of necessity be given in a place approved for confessions.

The list of Indulgences attached to the Rule of Leo XIII demands the same conditions for gaining this indulgence as for the papal blessing: confession, communion and prayers for the intention of the pontiff.

ARTICLE III

Indults granted to the Third Order Secular of St. Francis

A number of indults have already been mentioned in their special relation to the papal blessing and the blessing with plenary indulgence. Canonically speaking, indults do not come under the caption of indulgences, but since they are intimately connected with these blessings, and their application is necessary for the understanding of the same, they have been mentioned in immediate connection with those indulgences for the extension and the interpretation of which the Holy See has given them. Hence the reason for placing them under the heading of indulgences, rather than indults.

The following are the more important indults granted to the Third Order Secular of St. Francis:

a) Tertiary priests enjoy the indult of a personal privileged altar three days of each week, no matter where they celebrate Mass, provided they do not ask a similar indult for another day.¹

b) All Masses which are celebrated for the repose of the souls of deceased Tertiaries are privileged.²

c) Tertiary priests, even though canonically bound to the service of some church, may use the Romano-Seraphic Calendar in the recitation of the Divine Office, provided they are

¹ List of Indulgences attached to the Rule of Leo XIII, III, § 1.

² *Summarium indulgentiarum, privilegiorum ac indultorum*, approved by the S. C. of Indulgences, Sept. 11, 1901 (VI, 1).

not bound to choir;⁵ they should use the Calendar of the obedience to which they are subject as Tertiaries; they also partake of the privilege granted to the three First Orders of reading a votive Mass of the Immaculate Conception on every Saturday of the year which is not impeded by: a double of the first or second class, a vigil, the time of Quadregesima, Ember days, or a feast of the Blessed Virgin; this Mass must be celebrated in a church pertaining to one of the three First Orders, or in a private oratory.⁶

d) Tertiaries who are infirm or convalescing and cannot conveniently (commode) leave their homes; may recite five Our Fathers and Hail Marys together with prayers for the intention of the sovereign pontiff and thus gain the same indulgences as those attached to a visit to a church of the Franciscan Religious Orders or a Sodality.⁷ This indulgence is applicable to the indulgences which have been given by direct concession to visits to these churches, as well as those comprehended in the communication of Pius X.⁸

e) Tertiaries may gain all the indulgences granted to the faithful for visiting Franciscan Churches as well as those which are proper to the Third Order Secular, under the condition that they visit the parish church in those places where there is neither a Franciscan church or a public oratory of the Third Order Secular, or a church where a Sodality is canonically erected.⁹

⁵ S. C. of Rites, Apr. 14, 1904 (*Decreta Authentica S. C. R.*, n. 4132).

⁶ S. C. of Rites, March 22, 1905 (*A. S. S.*, XXXVIII, 40 f.).

⁷ Summarium indulgentiarum, privilegiorum ac Indultorum, approved by the S. C. of Indulgences, Sept. 11, 1901 (V, 5); can. 935 gives authority to the confessor to commute the pious works prescribed for gaining an indulgence, provided the conditions cannot be observed.

⁸ S. C. of the Holy Office, June 8, 1916, ad IV (*A. A. S.*, VIII [1916], 264).

⁹ Summarium indulgentiarum, privilegiorum ac indultorum, approved by the S. C. of Indulgences, Sept. 11, 1901 (V, 6).

f) Those indulgences which are gained for visiting Franciscan churches of the First and Second Order and the Third Order Regular, may be gained by the Tertiaries by visiting a church or a chapel where a Sodality is canonically erected.*

g) Secular Tertiaries living in seminaries, hospitals, colleges, prisons and other similar places which have a semi-public oratory, by visiting the same, can gain the same indulgences as are attached to visiting: the parish, a church of the First Order, that in which a Sodality is erected, or a public oratory of the Third Order, provided they are morally impeded from visiting the latter places.†

h) Tertiaries who gather for the monthly conference—the Director being absent on account of sacerdotal duties—recite the accustomed prayers, and hear a sermon in place of the conference, may gain the indulgence attached to attendance at the monthly conference, provided they are congregated with the authority of the Director.‡

* *S. C. of the Holy Office*, June 6, 1916 (*A. A. S.*, VIII [1916], 264).

† *S. C. of Indulgences*, July 18, 1902, ad I (*A. S. S.*, XXXV, 63).

‡ *S. C. of Indulgences*, Jan. 30, 1896, ad VI (*M. E.*, 9, Ser. I, vol. IX, 153).

APPENDIX

Rules of the Third Order

The original Rule of 1221 which follows is that which is referred to repeatedly in this dissertation. It is given here in extenso as a ready reference for the various assertions concerning the development of the Order itself and its Rule. The Rule of Nicholas IV in 1289 is omitted because it is easily accessible and few references have been made to it throughout this work. That of Leo XIII in 1883 is also given here on account of the great number of times it has been cited.

INCIPIT REGULA ET VITA FRATRUM VEL SORORUM PAENITENTIIUM¹

I. De modo vestium

1. Viri qui hujus fraternitatis fuerint de panno humili sine colore induantur cujus brachium sex soldorum Raven. pretium non excedat, nisi propter causam evidentem et necessariam, ad tempus, cum aliquo dispensetur. Et consideretur panni latitudo et arcitudo circa praedictum pretium. 2. Chlamydes et pelles habeant sine Scollatura fixas vel integras non tamen affiblatas ut portant saeculares et manicas clausas. 3. Sorores vero de ejusdem pretii panno et humilitatis chlamydes induantur et tunicas vel saltem cum chlamyde habeant guarnellum sive placentinum album vel nigrum aut amplum palutellum lineum sine crispaturis cujus brachium non excedat XII. den. Raven.; 4. de quo tamen pretio et de pellitionibus ipsarum dispensare poterit secundum conditionem cujuscumque mulieris et loci consuetudi-

¹ Sabatier, *Regula antiqua Fratrum et Sororum de Paenitentia* (*Opusculs de Critique Historique*, I, 17-30); the italics are from the original author.

nem. 5. Bindas vel ligaturas sericas sive coloratas non portent, et tam fratres quam sorores pelles habeant agninas tantum. 6. Bursas de corio et corrigias sine serico consutas et non alias habere liceat. Et alia ornamenta visitoris arbitrio deponant. 7. Ad convivia inhonesta, vel spectacula, vel choreas non vadant, histrionibus non donent et donari a familia prohibeant.

II. De abstinencia

1. Omnes abstineant a carnibus excepta dominica et tertia et quinta feria, nisi propter infirmitatem, debilitatem, minutionem tribus diebus et in itinere, 2. vel propter praecipuam solemnitatem intervenientem, scilicet nativitatis Domini per tres dies, anni novi, Epiphaniae, Paschae Resurrectionis per tres dies, apostolorum Petri et Pauli, nativitatis beati Johannis Baptistae, Assumptionis gloriosae Virginis Mariae, festi Omnium Sanctorum et sancti Martini. 3. Aliis vero diebus non jejunandis liceat comedere caseum et ova. Sed cum religiosis in eorum conventibus de apposis ab eis comedere licebit. 4. Et sint contenti prandio et cena, exceptis languidis et infirmis, viatoribus. Sanis cibus et potus sit temperatus. 5. Ante prandium et cenam dicant semel *Pater Noster*, post comestionem semel et gratias agant Domino. Alioquin dicant ter *Pater Noster*. 6. A Paschate Resurrectionis usque ad festum Omnium Sanctorum jejunent sexta feria. A festo Omnium Sanctorum usque ad Pascha quarta et Sexta feria jejunabunt, servantes nihilominus alia jejunia quae ab ecclesia indicantur generaliter facienda.

III. De jeuniis

1. Quadragesima vero sancti Martini post eamdem diem usque ad Natale et quadragesimam majorem a dominica carnisprivii usque ad Pascha continue jejunent, nisi propter infirmitatem vel aliam necessitatem. 2. Sorores gravidae

usque ad suam purificationem ab exercitationibus corporalibus exceptis vestibus et orationibus poterunt abstinere. 3. Laborantibus in fatigationibus a Paschate Resurrectionis usque ad sancti Michaelis dedicationem in die ter liceat cibum sumere. 4. Et quando aliis laborant de omnibus appositis comedere licebit excepta sexta feria et jejuniis ab ecclesia generaliter indictis.

IV. De orationibus

1. Omnes dicant quotidie septem horas canonicas vadelicet matutinum, primam, tertiam, sextam, nonam, vespereum et completorium; 2. clerici, secundum ordinem clericorum; scientes psalterium, pro prima *Deus in nomine tuo* et *Beati immaculati* usque ad *Legem pone* et alios psalmos horarum cum *Gloria Patri* dicant. 3. Sed quum ad ecclesiam non vadunt, dicant pro matutino psalmos quos dicit Ecclesia vel alios quoscumque XVIII psalmos vel saltem *Pater Noster*, ut illiterati. 4. In omnibus horis aliis pro matutino XII *Pater Noster* et pro unaquaque alia hora septem *Pater Noster* cum *Gloria Patri* post unumquodque. 5. Et qui sciunt *Credo in Deum* et *Miserere mei Deus* in prima et completorio dicant, si non dixerint horis constitutis, dicant tamen *Pater Noster*. Infirmi non dicant horas nisi velint.

V. Quando ire debent ad matutinum

1. Omnes ad matutinum vadant in quadragesima sancti Martini et majori nisi personarum vel rerum incommoditas immineret.

VI. De confessione et communione et aliorum satisfactione et de armis non sumendis et juramentis non praestandis

1. Confessionem de peccatis faciant ter in anno et communionem in nativitate Domini et Paschate Resurrectionis et Pentecosten recipiant.

2. De decimis praeteritis satisfaciant et de futuris praestent.

3. Arma mortalia contra quempiam non recipiant vel secum ferant.

4. Omnes a juramentis solemnibus abstineant nisi necessitate cogente in casibus a summo pontifice exceptis in sua indulgentia vadelicet pro pace, fide, calumnia et testimonio.

5. Et in eorum loquela sicut poterunt vitabunt juramenta. Et qui incaute juraverit lapsu linguae, ut in multiloquo contingit, eadem in sero, quum recogitare debeant quod fecerint, pro talibus juramentis dicant ter *Pater Noster*.

6. Quisque suam familiam confortet ad serviendum Deo.

VII. De missa et congregatione cujusque mensis

1. Omnes fratres et sorores cujuscumque civitatis et loci quolibet mense quandocumque videbitur expedire convenient apud ecclesiam quam ministri nuntiaverint, ibique audiant divina. 2. Et quilibet det massario unum denarium usuaalem quos idem massarius colligat et ministrorum consilio inter fratres pauperes et sorores distribuat, et maxime infirmis et eis qui non habuerint funeris exsequias. Demum inter alios pauperes et eidem ecclesiae de eadem pecunia offerat. 3. Et tunc, si commode possunt, habeant unum religiosum in Dei verbo instructum qui eos moneat et confortet ad paenitentiam, perseverantiam et opera misericordiae facienda. 4. Et sint sub silentia in missa et praedicatione, intenti officio, orationi et praedicationi, exceptis officialibus.

VIII. De operibus misericordiae et testamentis et discordiis reformandis

1. Quum aliquem fratrum vel sororum contigerit infirmari ministri per se vel per alios si infirmus eis fecerit nuntiari semel in hebdomada visitent infirmantem et ad paenitentiam

commoveant et sicut viderint expedire necessaria corporis quibus indiget de communi administrent.

IX. De fratribus defunctis

1. Et si de hac luce migraverit infirmatus nuntietur fratribus et sororibus qui fuerint in civitate vel loco praesentes ut ad ipsius convenient sepulturam nec recedant donec missa fuerit celebrata et corpus traditum sepulturae. 2. Et post, quilibet, infra octo dies defunctionis ipsius, dicat pro anima defuncti, presbyter missam, sciens psalterium quinquaginta psalmos, alii quinquaginta *Pater Noster* cum *Requiem aeternam* in fine cujusque. 3. Praeter haec infra annum pro salute fratrum et sororum vivorum et mortuorum dicat presbyter tres missas, sciens psalterium dicat ipsum, alii dicant centum *Pater Noster* cum *Requiem aeternam* in fine cujuslibet. Alioquin duplicent.

X. De testamentis faciendis

1. Omnes qui possunt de jure testamentum faciant et de rebus suis infra tres menses post promissionem disponant, ne quis ipsorum intestatus decedat.

2. De pace inter fratres et sorores aut extraneos discordes facienda, sicut ministris videbitur, sic fiat; habito etiam si expedierit consilio episcopi dioecesani.

3. Si contra jus vel privilegia fratres vel sorores a potestatibus vel rectoribus locorum in quibus habitant vexentur, ministri loci quod videbitur expedire cum consilio domini episcopi faciant.

4. Ministerium et alia officia quae sunt hic scripta sibi imposita quilibet suscipiat et fideliter exerceat, dum tamen per annum ab officio vacare quilibet possit.

5. Quum aliquis huic fraternitati intrare petierit, ministri ejus conditionem et officium inquirant et onera fraternitatis hujus et maxime alienorum restitutionem exponant ei.

6. Et si placuerit ei secundum praedictum modum, induatur, et de alienis satisfaciat, numerata pecunia vel cautione pignoris data. Proximis se reconciliet et de decimis satisfaciat. 7. Quibus impletis post annum cum consilio aliquorum discretorum fratrum, si eis idoneus videbitur, recipiatur hoc modo: 8. Quod promittat se observare omnia quae hic sunt scripta, sive scribenda, vel minuenda, secundum consilium fratrum toto tempore vitae suae, nisi aliquando de licentia stetit ministrorum. 9. Et quod si quid contra hunc modum fecerit, interpellatus a ministris, satisfaciat ad voluntatem visitoris. 10. Et per manum publicam promissio in scriptis redigatur ibidem. 11. Nemo tamen aliter recipiatur, nisi aliter eis visum fuerit considerata personae conditione et ejus instantia.

12. De hac fraternitate et de iis quae hic continentur nemo exire valeat nisi religionem ingrediatur.

XI. De contemptione et suspitione haereticorum

1. Nullus haereticus vel de haeresi diffamatus recipiatur. Si autem suspectus solummodo fuerit, purgatus coram episcopo, si alias idoneus fuerit, admittatur. consensu et licentia maritorum.

2. Mulieres vero viros habentes non recipientur nisi de

3. Incorrigibiles fratres et sorores a fraternitate ejecti iterum in ea nullo modo recipiantur, nisi saniori parti fratrum placuerit.

XII. De culpis dicendis

1. Ministri cujuslibet civitatis et loci culpas fratrum et sororum manifestas nuntient visitori puniendas. 2. Et si aliquis incorrigibilis extiterit, per ministros, habito consilio aliorum discretorum fratrum eidem visitori intimetur ab ipso de fraternitate abjiciendus et in congregatione publice

tur. 3. Insuper, si est frater, potestati loci vel rectori denuntietur.

4. Si quis sciverit de fratribus vel sororibus aliquem scandalum facere ministris nuntiet et visitatori valeat nuntiare et quod inter virum et uxorem non teneantur.

5. Visitator cum fratribus universis in iis omnibus potestatem habeant dispensandi quum viderint expedire.

6. Ministri cum consilio suorum fratrum post annum eligant duos alios ministros et fidelem massarium qui necessitati fratrum et sororum et aliorum pauperum provideat et nuntios qui dicta factaque fraternitatis de mandata eorum nuntiet.

7. In supradictis omnibus nemo obligetur ad culpam sed ad poenam, ita tamen quod si poenam a visitatore impositam vel imponendam, bis admonitus a ministris, exsolvere neglexerit, tamquam contumax obligatur ad culpam.

XIII. De culpis manifestandis

1. Statuimus quod nullus faciat fidejussionem pro aliquo, nisi forte pro aliquo de ista fraternitate, et hoc etiam fiat de licentia visitatoris vel ministrorum.

2. Item visitator de consensu ministrorum et aliorum fratrum dat licentiam fratribus non eundi ad ecclesiam aliquo tempore, dummodo bene dicat matutinum et alias horas suas.

3. Item quilibet frater confiteatur alicui sacerdoti semel in quolibet mense, quia in sancta confessione omnia lavantur et major gratia Dei datur.

4. Item visitator et ministri hujus fraternitatis petant a ministro vel custode fratrum Minorum unum fratrem Minorem de conventu, cujus fratris consilio et voluntate fratrum ista fraternitas gubernetur in omnibus et regatur. 5. Et quando ille frater recederet de conventu, petant alium loco ejus, ita quod semper consilio fratrum Minorum regatur ista fraternitas quae a beato Francisco habuit fundamentum.

6. Item omnes fratres conveniant in prima dominica cujuslibet mensis ad missam in loco fratrum Minorum, nisi remaneant, de licentia visitoris vel ministrorum, propter aliquam legitimam causam. Et similiter eodem die conveniant ibidem post nonam. 7. Item si visitor vel ministri non poterunt interesse in die quando ista fraternitas congregatur, aliqua causa legitima impediens, quilibet eorum faciat unum vicarium loco sui qui tunc ejus officium exerceat, ita quod sancta fraternitas non contingat propter hoc inpediri.

8. Item quicumque fratrum istius fraternitatis fecerit publice aliquid scandalum vel aliquem excessum accuset seipsum de hoc publice coram omnibus fratribus in die quando fratres conveniunt. 9. Et si non se accusaverit, alius frater qui scit excessum, illum accuset in publico, et per visitatorem vel ministros vel eorum vicarios illi qui fecit excessum paenitentia cum misericordia imponatur, nisi sit talis excessus propter quem sit ille qui peccaverit de ordine expellendus.

10. Item nulla nova constitutio fiat nisi de majoris partis hujus fraternitatis consilio et assensu.

11. Item si quis ordinem nostrum intrare voluerit si teneatur restituere alicui personae aliquid male acquisitum restituat ei vel ejus haeredibus si cognoscit eos. 12. Si autem dubitat utrum habeat de illicite acquisitis sed nescit cui et quantum restituere teneatur faciat praeconizari per terram, ut moris est, vel in praedicatione solemni diei, quod ipse paratus est satisfacere omnibus quibuscumque quocumque modo aliquid satisfacere teneatur.

13. Item nullus frater deponat querimoniam coram potestate vel alio iudice pro re aliqua vel injuria contra fratrem aliquem vel sororem de ordine nostro, nisi forte de licentia visitoris et ministrorum suorum et majoris et sanioris partis loci consilio et assensu. 14. Sed volumus et statuimus quod si aliqua causa vel controversia seu discordia fuerit inter fratres quacumque de causa per visitatorem et minis-

tros, habito si oportuerit aliquorum discretorum consilio, terminetur. 15. Et quidquid visitator et ministri diffinierint, ut est dictum, fratres illi inter quos causa versabitur teneantur firmiter observare, ita quod inter religiosos et saeculares de fratribus nostris, auctore Deo, nullum scandalum oriatur. Explicit.

Rule of the Third Order Secular of St. Francis approved by Leo XIII, May 30, 1883.¹

LEX

SODALIVM FRANCISCALIVM TERTII ORDINIS QUI SAECULARIS DICITUR

CAP. I

DE COOPTATIONE, TIROCINIO, PROFESSIONE

§1. Ne quos cooptari liceat, nisi majores quatuordecim annorum, eosque bene moratos, retinentes concordiae, atque in primis sanctitate professionis catholicae probatos, spectatoque erga Ecclesiam Romanam Sedemque Apostolicam obsequio.

§2. Nuptae, nisi sciente et consentiente viro, ne cooptentur, extra quam si secus videatur faciendum, auctore sacerdote conscientiae ipsarum iudice.

§3. Adlecti in sodalitatem *scapulare* parvum unaque cingulum de more gerant: ni gesserint, statis privilegiis juriisque careant.

¹ This was issued in the Constitution, *Misericors Dei Filius*, and is contained in the *Fontes*, n. 588; A. S. S., XV, 513-520; *Leonis XIII Acta*, III, 230-238; Fleming, *Leonis XIII Acta ad III Ordinem spectantia*, 72-87; only the Rule itself will be given here: the Constitution of approval as well as the list of Indulgences attached to the Rule will be omitted. Italics are as given in the *Fontes*.

§4. Qui quaeve Tertium Ordinem inferint, unum ipsum annum tirocinio exigant: mox, Ordinem rite professi, servaturos sese jura Dei, obedientes Ecclesiae dicto futuros; si quid in iis, quae professi sunt, deliquerint, satis facturos singuli spondeant.

CAP. II.

DE DISCIPLINA VIVENDI

§1. Sodales Tertii Ordinis in omni cultu habituque, sumptuosiore elegantia posthabita, teneant eam, quae singulos deceat, mediocritatis regulam.

§2. Choreis ludisve scenicis procacioribus, item commisationibus perquam caute abstineant.

§3. Pastu atque potu utantur frugaliter: neve ante vel accumbant vel assurgant de mensa, quam invocato pie gratue Deo.

§4. Jejunium Mariae Virgini Immaculatae, item Francisco Patri, pridie sacra solemnia, singuli servanto: admodum laudabiles, si qui praeterea vel jejunium in sextas, vel abstinentioniam carnum in quartas quasque ferias servarint, disciplina veteri Tertiariorum.

§5. Admissa rite expianto per menses singulos: item ad divinum epulum accedant per menses singulos.

§6. Tertiarios ex ordine Clericorum, quod Psalmis quotidie dant operam, nihil praeterea hoc nomine debere placet. Laici, qui nec canonicas, neu Mariales preces, vulgo *Officium parvum B. M. V.*, persolvunt, precationem Dominicam cum Salutatione Angelica et *Gloria Patri* adhibeant duodecies in dies singulos, excepto si per valetudinem non liceat.

§7. Quibus est testamenti factio, ii suo quisque tempore de re sua testentur.

§8. In familiari vita studeant ceteros exemplo antecedere: pietatis artes, resque optimas provehere. Libros vel diaria,

unde pernicies virtuti metuatur, domum suam inferri, ab iisque, qui in ipsorum potestate sint, legi ne sinant.

§9. Caritatem benevolam et inter se et ad alienos sedulo tueantur. Componendas, ubicubi possunt, discordias curent.

§10. Jusjurandum ne jurant umquam, nisi necessario. Turpia dictu, scurriles jocos fando fugiant. Excutiant sese vesperi, num tale quidquam temere fecerint: si fecerint, errorem poenitendo corrigiant.

§11. Rei divinae, qui commode possunt, quotidie intersint. Ad coetus menstruos, quos Praefectus indixerit, conveniant.

§12. Conferant in commune pro facultate quisque sua non-nihil, unde vel tenuiores e sodalium numero, praesertim affecta valetudine, sublevantur, vel divini cultus dignitati consulatur.

§13. Ad sodalem aegrotantem Praefecti vel adeant ipsi, vel mittant, qui caritatis officia expleat. Iidem, in morbo ancipiti, moneant suadeant, ut quae ad expiandum animum pertinent, aegrotus tempestive curet.

§14. Ad exsequias sodalis demortui sodales municipales hospitesve conveniant, simulque Mariales preces instituto Domini Patris, id est *Rosarium*, tertiam partem ad caeleste demortui solatium adhibeant. Item sacerdotes inter rem divinam, laici, si poterunt, sumpta Eucharistia, pacem fratri defuncto sempiternam pii volentes adprecentur.

CAP. III.

DE OFFICIIS, DE VISITATIONE, DEQUE IPSA LEGE

§1. Officia, advocatis ad conventum sodalibus, deferantur. Eadem trinealia sunt. Oblata ne qui sine causa justa recusent, neu oscitanter gerat.

§2. Curator, qui *Visitor* audit, diligenter quaerat, sat-isne salvae leges. Eius rei ergo, sodalitorum sedes in singu-

los annos, eoque crebrius, si res postulaverit, pro potestate circumeat, coetumque habeat, Praefectis sodalibusque universis adesse jussis. Si quem *Visitor* ad officium monendo jubendo revocarit, sive quid, salutaris poenae nomine, in quemquam decreverit, hic modeste accipiat, idemque luere ne abnuat.

§3. *Visitatores* ex Primo Franciscalium Ordine, vel ex Ordine Tertio Regulari legantur, quos Custodes seu *Guardiani*, si id rogati fuerint, designabunt. *Visitoris* munere laicis viris interdictum esto.

§4. Sodales nec obediētes et noxii iterum et tertium admoneantur officii sui: ni pareant, excedere Ordine jubeantur.

§5. In his legibus si qui forte quid deliquerint, hoc se nomine culpam suscepturos nullam sciant, exceptis iis quae jure divino Ecclesiaeque legibus alioqui praecipuntur.

§6. Si quae hujus capita legis quemquam servare causa gravis et justa prohibeat, eum ex ea parte lege solvi, eademve capita commutari prudenter liceat. Cujus rei Praefectis ordinariis Franciscalium et Primi Ordinis et Tertii item *Visitoribus* supra dictis facultas potestasque sit.

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QUAS
AD DOCTORATUS GRADUM
IN JURE CANONICO
APUD UNIVERSITATEM CATHOLICAM AMERICAЕ
CONSEQUENDUM
PUBLICЕ PROPUGNABIT
GERALDUS JOSEPHUS REINMANN
SACERDOS EX ORDINE FRATRUM MINORUM
CONVENTUALIUM
BACCALAUREUS ARTIUM
ET
LICENTIATUS IN JURE CANONICO
HORA IX A. M. DIE II JUNII A. D. MCMXXVIII

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BIOGRAPHICAL NOTE

JOSEPH ANTHONY REINMANN was born in Syracuse, New York, July 25, 1902. After completing his elementary and secondary education, he entered the novitiate of the Order of Friars Minor Conventual, taking the name of Gerald Joseph Reinmann. He was professed in the Order August 4, 1921, and entered the Seminary of the Order at St.-Anthony-on-Hudson, Rensselaer, New York, in the fall of that year, where he was ordained to the Holy Priesthood, May 30, 1926. The following September he entered the graduate School of Canon Law at the Catholic University of America.

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and
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A DISSERTATION

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fulfillment of the requirements for
the Degree of*

DOCTOR OF CANON LAW

by the

REVEREND FRANCIS J. SCHENK, A.B., S.T.B., J.C.L.,
of the Archdiocese of St. Paul.



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To the
MOST REVEREND AUSTIN DOWLING, D. D.,
Archbishop of St. Paul
in
Reverence and Gratitude

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PRINCIPAL ABBREVIATIONS

- AAS—*Acta Apostolicae Sedis*.
 AER—*The American Ecclesiastical Review*.
 AkKR—*Archiv für katholisches Kirchenrecht*.
 ASS—*Acta Sanctae Sedis*.
 CIC—*Codex Iuris Canonici*.
 Coll.—*Collectanea S. Congregationis de Propaganda Fide*.
 Denz.—Denzinger, H., - Bannwart, C., *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum*.
 Fontes—*Codicis Iuris Canonici Fontes*.
 HPR—*The Homiletic and Pastoral Review*.
 IER—*The Irish Ecclesiastical Record*.
 Jus Pont.—*Jus Pontificium*.
 LQS—*Theologisch-praktische Quartalschrift* (commonly is known as *Linzer Quartalschrift*).
 Mansi—Mansi, J. D., *Sacrorum Conciliorum Nova et Amplissima Collectio*.
 MPL—Migne, J. P., *Patrologiae Cursus Completus - Series Latina*.
 NRT—*Nouvelle Revue Théologique*.
 Thes.—*Thesaurus Resolutionum Sacrae Congregationis Concilii*.
 ZkT—*Zeitschrift für katholische Theologie*.

INTRODUCTION

The background of any study of the impediments of Mixed Religion and Disparity of Cult is the attitude of the Church towards heresy and infidelity. That attitude is well known and well established by the tradition of the Christian ages. Both with regard to the pagan and hostile environment of the Roman Empire and to the early assaults of heresy but one policy under different names seems to have resulted. For the one it was segregation, for the other it was excommunication. In both cases it was avoidance.

The games, the fashions, the daily life of peoples who lived so much in the open and together betrayed in the stress of patriotic crises the *gens lucifuga* which tried to maintain its cultus and preach its doctrines in secret when its more daring propaganda was opposed. The anathemas of early councils brought about new lines of separation. There was to be no association of the orthodox with pagans, Jews, and heretics.

To what extent it was possible in the early centuries to maintain this discipline of avoidance is a matter difficult to determine. St. Augustine could complain that many of his time did not consider it a sin to contract marriages with unbelievers. Nay more, the Church at Chalcedon found it necessary to reprimand the scandalous examples of such marriages among clerics.

Whatever proportions such laxities assumed, it is significant that they met the incessant protests of the Fathers and of the councils. Of particular constancy were the prohibitions of the councils along the Mediterranean littoral against the marriages of Christians with Jews. Perhaps these enactments reflected the prevalence of abuses. More probably, they represented the growth of a popular aversion to any association with a Jew. At any rate, they grew in number and severity with the advance of the centuries until finally they appear to have assumed the form of a diriment impediment.

But with the advent of the twelfth century new dangers threatened the Christian body. For years, the Moor, the Saracen, the Mohammedan, had been terrorizing the southern shores of Europe,—now he was thundering upon its eastern gates. The heretic again lurked at home. Perhaps he passed for a devout Catholic, as his training and environment implied that he was. But he was restless to spread his new evangel, and he gathered around him followers and presently raised his banner of religious revolt.

Christendom was aroused as never before to the sense of its perilous condition. Everything that had been raised to destroy it was to be exterminated. If St. Dominic and his companions could not subdue the stubbornness of the heretic by exhortation and by prayer, Simon de Montfort would bring him to a sullen acquiescence by the might of his crusading sword. The Mohammedan would not only be held in check,—he would be driven from the very walls of his own strongholds.

There was, therefore, no question in the minds of the faithful of countenancing any such thing as a marriage of a Catholic with an unbeliever. That was high treason to their deepest interests and loyalties. The aversion that for many centuries had been confined largely to the marriages of Catholics with Jews now came to embody every marriage that the faithful might contract with those alien to the Faith. It is not surprising, therefore, to find in the writings of the authors of the twelfth century the repeated *dictum* that the marriages of Catholics with infidels, Jews, or heretics were in valid. There was not even an attempt on the part of these writers to defend this teaching. It was an accepted fact that seemed for the time to brook no challenge.

Under the studied scrutiny of the theologians and canonists of the thirteenth century the diriment force of the impediment would be restricted to the marriages of the baptized with the unbaptized, but even this modification would in no way affect the policy of the Church in its discipline of avoidance. The Inquisition would take care of heresy at home; the Crusades of infidelity abroad.

How then, and in what circumstances, was it ever possible for the Church who had so repeatedly and so strongly expressed her mind on the subject of infidels and heretics to bring herself to a position in which she would permit one of her own children to enter into the closest of human relations with either the heretic or the infidel?

Two leading events of the sixteenth century appear to have brought on this change. One was represented by the enthusiastic missionary activity in the Orient and in the newly discovered continents to the West, the other by the avalanche of heresy that swept over Europe. The Church felt constrained to provide by dispensations for the conditions that naturally arose in missionary regions. In Europe, however, it seemed utterly intolerable to the Church to permit a union of marriage founded upon a broken unity of the Faith in the very places where the Faith had flourished for centuries.

But when all doubt as to whether or not the Reformation had come to stay had finally passed, yet when there were still hopes that the conversion of a ruler might bring back his people to the Faith, it is then that one might expect to trace the beginnings of dispensation. The first sources that bring to light the procedure of the Roman *Curia* are furnished by the examples of the mixed marriages of Catholic rulers. Not only in the "Spanish Match" which ended in a fizzle, but also in the long drawn out discussions which accompanied the contract of Prince Charles with Henrietta Marie are found in embryo the development of this dispensation. It was an affair that concerned kingdoms rather than individuals. It involved the making of a treaty between nations. Everything had to be foreseen. There were to be the provisions for the religious freedom of the princess, for the Catholic education of the children, for the mitigation of the penal laws against the British Catholics. Such transactions were elaborate and prolonged for they were to serve as precedents for the years to come.

Of all these formalities only the *cautiones scriptae* remain. Even the causes, which in the beginning had been restricted to those of a manifest public concern, yielded to the recognition of those of a private nature when the mixed marriages of the common people were to be contracted with Papal dispensation.

The Code expresses the same ancient abhorrence of mixed marriages. *Severissime Ecclesia ubique prohibet!* Yet it is a discipline that has been modified by circumstances and experience. While the Church repeats in a language born centuries ago the prohibitions to such marriages, she also provides for exceptions through dispensation. She yields when greater evils would follow upon her absolute resistance. She reserves the right of dispensation to the Congregation of the Holy Office yet grants faculties to Bishops by way of exception. She insists that the pastors of her flock be ever vigilant in deterring her children from such marriages, yet admonishes them to temper their severity with prudence and patience.

The writer takes this occasion to express his sincere gratitude to the illustrious members of the Faculty of Canon Law for their timely and helpful assistance in the preparation of this study; to Archbishop Dowling for the opportunity of advanced studies, and for his kindly and unfailing interest; to the librarians of the University Library for their many courtesies; to all, and especially to the Reverend Rudolph E. Nolan, who have assisted in the revision of the text in preparing it for the press.

PART I
PRELIMINARY DISCUSSION

CHAPTER I

PROHIBITIONS OF THE DIVINE AND NATURAL
LAW TO MARRIAGES OF CATHOLICS
WITH NON-CATHOLICS

ART. I. FAITH AND THE SACRAMENT OF MARRIAGE

1. Marriage is the great social sacrament that has for its primary end the generation of human life. Baptism is the social sacrament of the regeneration of this life unto Christ. Men are born as the natural sons of men to be reborn as the adopted sons of God. Marriage is truly a sacrament of life; Baptism, a sacrament of the rebirth of life, and preëminently a sacrament of Faith, for through Baptism man receives the virtue of faith, which is the foundation of his reborn life.

2. Faith is a supernatural virtue that enables man to believe the revealed truths of God on the authority of God revealing. Though freely given, it is a gift that must be used as a means of salvation for it is the basis of the life of grace, the root of justification.¹ "The just man liveth by faith."

3. The virtue of faith is intimately connected with the sacrament of marriage. The sacrament of marriage reflects a profound mystery, that of the union of Christ with His Church. Grace is the principle of Christ's union with the Church, wherein is kept the unity and integrity of the Faith. It is likewise the supernatural principle of the union of husband and wife, having its root in the virtue of faith received through Baptism, the sacrament of faith. The sacrament of marriage is possible because of the sacrament of faith. The grace of the sacramental union of marriage dwells in those united to the Church and in Christ through the unity of the profession of faith. The holiness of marriage has its full realization

¹ Conc. Trident., sess. VI, *de justificatione*, cap. 8.—Denz., n. 801.

² Rom., I, 17.

only in those who are united in the true Faith. Where there is a departure from this unity, though the husband and wife vow to each other in Christ to have their bodies united in one, yet they rend the body of Christ by belonging to different communions.*

ART II. PROHIBITIONS OF THE NATURAL LAW TO MARRIAGES OF CATHOLICS WITH NON-CATHOLICS

4. But far more than the violation of this sacred ideal is involved in the marriages of Catholics with non-Catholics. The very faith that binds the Catholic to the Church and to Christ is endangered by such a union. A daily familiarity with error or unbelief removes half the dread of it.

5. The common adjustments of marital difficulties are based largely on the sacrifice of individual selfishness. But when husband and wife adhere to different professions of faith, it is no far step from the normal, mutual concessions to the sinful compromises in matters of faith. The transition may at times be almost imperceptible, arising from a delusion of fairness or broadmindedness. It readily passes into the most dangerous indifference; it may even reach the length of a compromise in the religious education of the children. In the eyes of the world such concessions may bear the semblance of equity; in the eyes of God they are treason. To barter in matters of faith is to betray the means of salvation.

6. Where marriages represent a division in faith the danger to the faith of the children is even greater than that which exists for their Catholic parent. The convictions of children will not grow normally into those that are truly Catholic where the home is not thoroughly Catholic. To what rule of faith will they adhere when they see their parents divided on the question? What Catholic instruction will they receive in the home where the Catholic parent has succumbed to indifference? Even if a Catholic father or mother has not become indifferent, what convincing explanation will be given to the

* "Nonne ingemiscimus quod vir et uxor, ut fideliter coniungant corpora sua, iurant sibi plerumque per Christum, et ipsius corpus Christi diversae communione dilaniant?"—S. Augustinus, *Epist.*, XXIII, n. 5.—*MPL*, XXXIII, 97.

children for the indifference or open opposition of the non-Catholic parent to the truths that are taught them as the most sacred and fundamental in life? *Verba movent, exempla trahunt!*

ART. III. PROHIBITIONS OF THE DIVINE LAW

The warnings found in both the Old and New Testament are authentic evidence that such marriages are full of perils, the hazards of the shipwreck of the faith.

§ I. THE OLD TESTAMENT

7. In the history of man before the coming of Christ the Jews were God's Chosen People. They were the special beneficiaries of God's favor, and of His Divine Revelation to man. They too were to be justified by faith.⁴ But living amongst the pagans who still remained in large numbers in the Promised Land, the Jews often forsook their God. Through marriages with these pagans the hearts of many Jews were turned to the brazen creations of idolatry. God's laws were, therefore, directed especially towards preserving the faith of His people by deterring them from alliances with heathens.

8. Thus in the Book of Exodus (XXXIV, 16) God forbade the Jews to marry daughters of the pagans lest they too become idolators. More explicit was the prohibition to marital unions with the seven pagan nations in the land of Cana: "Thou shalt make no league with them, nor show mercy to them: Neither shalt thou make marriages with them. Thou shalt not give thy daughter to his son, nor take his daughter for thy son: *For she will turn away thy son from following me, that he may rather serve strange gods . . .*"

9. Cardinal Bellarmine in referring to this prohibition says that though the precept was judicial and strictly bound

⁴ For a further discussion of the dangers to the faith of the children see Clemens XIII, ep., *Quantopere*, 16 Nov. 1763, §§ 2-3,—*Fontes*, n. 460; Pius VII, rescript. (ad ep. et vicar. capit. Galliar.), 17 Feb. 1809,—Migne, *Theol. Curs. Complet.*, XXV, 710; Tanquary, *Theol. Mor.*, Tom. I, n. 907.

⁵ Cf. Rom., IV.

⁶ Deut., VII, 1-4; cf. Jos., XXIII, 12-13.

only the Jews, it was also moral in its nature, transcending, therefore, the abrogation of judicial enactments and passing with full vigor into the Christian Dispensation.⁷

10. The wisdom of the prohibitions saw ample confirmation in the evil results that so often followed when they were disregarded. The tragic defection of Solomon is memorable.⁸ Such marriages were among the chief causes that deprived the Chosen People of God's protection and brought heathen worship into the very palaces of their kings and to the gates of the Temple.

§ II. THE NEW TESTAMENT

11. If in the Old Law the marriages of Jews with certain pagans were forbidden because of the attendant moral dangers, there is evident reason for similar precepts in the New and more perfect Dispensation. ". . . For what participation hath justice with injustice? Or what fellowship hath light with darkness? Or what part hath the faithful with the unbeliever?"⁹

12. At first sight St. Paul seems, therefore, to forbid the marriages of Christians with pagans when he writes: "Bear not the yoke with unbelievers."¹⁰ Yet there is not an agreement as to the precise meaning of the text. In the opinion of some of the Fathers¹¹ and learned authors,¹² St. Paul's concern is centered especially on *marriages* with unbelievers. Others, again,

⁷ Lib. I *De Sacram. Matr.*, cap. XXIII.—*Op. Omnia*, Tom. V, p. 119-120. Vide etiam Sanchez, *De Matr.*, Lib. VII, Disp. 71, n. 5.

⁸ III Kings, XI, 1-11.

⁹ Cf. Judges, III, 5-7; III Kings, XVI, 31-32; I Esdras, IX; Malach., II, 11-12.

¹⁰ II Cor., VI, 14-15.

¹¹ II Cor., VI, 14.

¹² Cf. S. Cyprianus, *Ad Quirinium*, Lib. III, cap. 62.—*Corp. Scr. Eccles. Lat.*, Vol. 3, pars I, p. 240; S. Hieronymus, *Adv. Jovinianum*, Lib. I, n. 10,—*MPL*, XXIII, 225.

¹³ Estius, *In Omnes B. Pauli Comment.*; Calmet, Tom. VIII; Tirinus, *Comment. in Univ. S. Script.* (Isti auctores ad vers. cit.); Binterim, *Denkwürdigkeiten*, VI, I, p. 427-428; Wernz, *Ius Decret.*, IV, n. 503, not. 9; Cappello, *De Sacram.*, III, n. 426; Blat, *Comment.*, Vol. III, P. I, n. 467.

derive a different meaning,¹⁶ namely, that the Apostle is reminding the Corinthians that as Christians they have been cleansed from their former pagan vices. Never again may they return to them. Construed in this manner, the text has no direct reference to marriage."

13. A clearer instance of a warning or prohibition can be found in St. Paul's First Epistle to the Corinthians (VII, 39) where, in permitting a widow to marry again, he adds the warning, ". . . only in the Lord." Very frequently these words are interpreted to mean "Christian" as St. Thomas,¹⁷ Estius, Cornelius a Lapide, Tirinus,¹⁸ and Cornely¹⁹ prefer. Others, however, construe the words as referring to the *manner* of marrying, that is, with an upright and religious intention,—not from base motives."

14. The opinion that the phrase refers to the *person* rather than to the *manner* of the marriage is confirmed on an examination of the twenty-second verse of this same chapter.²⁰ Here the very same words are used, "in the Lord" (*ἐν κυρίῳ*), and they seem to designate a *Christian person*. It would appear, therefore, more in conformity with sound exegesis to interpret a disputed passage of the *same chapter* by one that is clear,

¹⁶ Thomas Aq., *In Omnes D. Pauli Epist. Comment.*, II Cor., cap. VI, Lectio III; Cornely, *Comment. in S. Pauli Epist.*, III, ad II Cor., VI, 14; Leitner, *Lehrb. des kath. Eherechts*, p. 183, not. 6. Other authors do not subscribe definitely to a fixed opinion. Cf. Cornelius a Lap., *Comment. in Sacram. Script.*, Tom. IX, ad II Cor., VI, 14; Van Steenkiste, *S. Pauli Epist.*, vers. cit.

¹⁷ "Verum cavendum est, ne his verbis neophytis omne commercium cum ethnicis, qui nomine infidelium designantur, interdicti censeatur . . . Ad eius [S. Pauli] mentem iugum cum infidelibus ducunt, quicumque iisdem, quibus illi, perversis studiis dediti eosdem cum illis perversos fines sectantur eademque perversa via incedunt; atque iugum cum infidelibus ducentes fiunt Christiani illi qui a pristinis vitae suae ethicae criminibus abluti et sanctificati ad eadem revertuntur . . . Quapropter iis non assentimur, qui . . . his verbis speciatim cautum esse arbitrantur ne fideles cum infidelibus matrimonia contraherent . . . At de his consortiis Apostolus hos in loco diserte non agit, sed de vitiis fugendis, quae eos ethnicis similes reddant."—Cornely *loc. cit.*

¹⁸ *Op. cit.*, I Cor., cap. VII, Lectio VIII.

¹⁹ Isti auctores in *op. cit.*

²⁰ *Comment. in S. Pauli Epist.*, II, ad vers. cit.

¹⁹ Cf. Calmet, Tom. VIII, ad Cor. VII, 39. The Fathers themselves are divided in their interpretation. Cf. Cornely, *loc. cit.*; Tournely, *Prael. Theol. de Sacram. Matr.*, Quaest. II, concl. 4.

²⁰ Cf. Binterim, *Denkwürdigkeiten*, VI, 1, p. 427.

especially if the expression is identically the same, and the context freely permits it. St. Paul would here seem clearly to demand that Christians marry only Christians.

15. The same Apostle is quite explicit in condemning associations with idolators,²¹ and those who taught contrary to his doctrine.²² He writes to Titus (III, 10) "A man that is a heretic, after the first and second admonition, avoid." St. John is even more severe in his warning. He forbids the faithful to greet or to extend any hospitality whatsoever to false teachers.²³ While these latter references to passages from the New Testament do not, indeed, refer directly to marriage, the warnings to abstain from the ordinary associations of life would assuredly apply with even greater force to the most intimate and life-enduring society, the union of marriage.

ART. IV. VALIDITY OF SUCH MARRIAGES IN THE NATURAL AND DIVINE LAW

16. Great as the hazards may be, no valid inference can be adduced to show that such marriages are at the same time *invalid* by the natural or the divine law.²⁴ One instance in the Old Testament is at times cited as proof that the marriages of Jews with pagans were regarded as invalid. In the First Book of Esdras (X, 3) we read: "Let us make a covenant with the Lord our God, to put away all the wives, and such as are born of them, according to the will of the Lord, and of them that fear the commandments of the Lord our God: let it be done according to the law." In the eleventh verse of the same chapter Esdras commands: ". . . separate yourselves from the people of the land, and from your strange wives." Yet Pope Benedict XIV when commenting on this passage, says

²¹ I Cor., V, 11.

²² Rom., XVI, 17.

²³ II John, 10-11. Cf. Tirinus, *Comment. in Univ. S. Script.*, ad II Joan. 10-11.

²⁴ Cf. Benedictus XIV, ep. *Singulari*, 9 Feb. 1749.—*Fontes*, n. 394; Sanchez, *De Matr.*, Lib. VII, Disp., 71, n. 7; Bellarminus, Lib I *De Sacram. Matr.*, cap. XXIII, *Op. Omnia*, Tom. V, p. 118-119; Schmalzgrueber, *Jus Eccles. Univ.*, Tom. IV, P. II, Tit. VI, n. 127; Billuart, *Curs. Theol.*, Tom. XIII, Dissert. VII, art. 10; Pirhing, *Jus Can.*, Tom. IV, Tit. I, Sect. VI, n. 164.

that even here the text should be interpreted in the light of the prohibition in the Book of Deuteronomy (VII, 1-4). The marriages were, indeed, prohibited but not invalidated; the separation that was commanded is to be understood in the sense of a *separation from bed and board*.¹⁸

17. Even on the probable supposition that the marriages in question were regarded as invalid, the separation was, nevertheless, the verdict of a judicial decree. It extended only to those marriages contracted with the pagans in the land of Cana.¹⁹ Since the judicial precepts of the Old Law ceased with the New Dispensation, the enactment of Esdras does not bind Christians.²⁰ Nowhere in the New Testament are such marriages prohibited under pain of invalidity. The natural law in like manner postulates no such sanction. The force of these prohibitions is to render such marriages illicit when the dangers to the faith are present.

ART. V. CESSATION OF THE PROHIBITIONS OF THE DIVINE AND NATURAL LAW

18. In individual cases it may happen, however, that the dangers contemplated in the divine and natural law are absent, or have at least been rendered remote. Since the hazards to the faith form the basis of the prohibitions of the natural and divine law, their absence removes the foundation of the prohibitions, and in such instances the prohibitions themselves cease.²¹

¹⁸ Ep. *Singulari*, 9 Feb., 1749, § 6.—*Fontes*, n. 394.

¹⁹ Benedictus XIV, *ep. cit.*, § 5; Bellarminus, Lib. I *De Sacram. Matr.*, cap. XXIII.—*Op. Omnia*, Tom. V, p. 119; Salmanticenses, Tract. IX, *de Matr.*, cap. XII, punct. VI, nn. 70-71. In other instances where such marriages were contracted, they are not referred to nor regarded as invalid. See Genesis, XLI, 45; Exodus, II, 21; Judges, XIV, 3-4; III Kings, XI, 1-11 & XVI, 31-32; Santi, *Prael. Juris Can.*, Lib. IV, Tit. I, n. 171.

²⁰ Santi, *op. cit.*, Lib. IV, Tit. I, n. 172.

²¹ Cf. Tournely, *Prael. Theol. de Sacram. Matr.*, Quaest. VII, concl. 2; Bailly, *Theol. Dogm. et Mor.*, Tom. VI, Tract. *de Matr.*, pars II, cap. II, n. 6; Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 714.

CHAPTER II

DEFINITION OF MIXED RELIGION AND DISPARITY OF CULT—BASIS OF DISTINCTION

19. The Church in her divinely appointed mission of guarding faith and morals has repeated the prohibitions of the divine and natural law, and has added to them her own legal contributions. Juridically speaking, she has erected impediments to the marriages of Catholics with heretics and schismatics, and to the marriages of the baptized with the unbaptized. These canonical barriers are commonly known as the impediments of "Mixed Religion" and "Disparity of Cult".¹

ART. I. DEFINITION

20. "Mixed Religion" may be defined as a *prohibitive* impediment to a marriage *between two baptized persons*, one of whom belongs to the Catholic Church, and the other to an heretical or schismatic sect. "Disparity of Cult", on the other hand, is a *diriment* impediment to a marriage between a person who is *baptized* and one who is *not baptized*.²

§ I. ETYMOLOGICAL DERIVATION

21. If the terms "Mixed Religion" and "Disparity of Cult" are examined in relation to each other, the connotation of a specific difference in the names themselves is not clear. The word "cult" is derived from the Latin "*colere*", meaning to cultivate, to take care of, to pay respect to, to worship. "Disparity" is derived from the Latin "*dispar*" (*dis+par*), meaning unlike, different, unequal. "Mixed" is from the Latin "*miscere*",—to mingle, to mix; and "Religion" is from the

¹ The term "Disparity of Worship" is also frequently used.

² The fundamental characteristic of the impediment rests on the difference existing between the baptized and the unbaptized. The restriction of the Code (canon 1070, § 1) to Baptism in the Catholic Church, is not considered for the present.

Latin "*relegere*",—to read again, to treat carefully; or from "*religare*",—to bind, to bind or to subject oneself to God.^a

§ II. SIGNIFICANCE OF THE TERMS

22. "Cult" may be defined as a man's interior or exterior worship of God, or of a Supreme Being (or Beings). In an objective sense, "religion" is the sum total of beliefs and practices by which men are directed to God; in a subjective sense it is a voluntary subjection of oneself to God, or some invisible and superior Being (or Beings) on whom there is a consciousness of being dependent.

23. Though notable differences exist in the concepts of religion and cult, the attempt to explain the exact difference between Disparity of Cult and Mixed Religion, on the basis of the terms themselves, is beset with difficulties.⁴ In the first place the term "disparity" is predicated of "cult" and the term "mixed" of "religion". There is, therefore, no common term of comparison. Wernz⁵ attempts to bring out the distinction by the use of the Greek phrase *ἡ διαφορά τῆς θρησκείας* to designate Disparity of Cult, and the phrase *ἡ διαφορά τοῦ δόγματος* to designate Mixed Religion.⁶ Some distinction between the two phrases appears to have been employed also in the Eastern Church though it was not sharply defined.⁷ The use of the same word *ἡ διαφορά* as it is predicated of both *ἡ θρησκεία* and *τὸ δόγμα* does, indeed, establish a common term of comparison, yet the recourse to the Greek phrases does not seem to be conclusive in determining the decisive difference between the impediments.

^a The discussion as to the correct derivation of the word "*religio*" has never been settled with finality. The question is of no vital consequence in the present discussion.

⁴ "Quae terminologia nunc iam diu recepta sine dubio in praxi est retinenda, quamvis differentiam utriusque impedimenti clare obvioque sensu non exprimat. Nam tandem aliquando in utroque impedimento habetur diversitas *cultus* et *disparitas religionis*, quemadmodum quilibet infidelis est acatholicus, licet in causis matrimonialibus frequenter solummodo acatholici dicuntur christiani sive baptizati, qui sectis haereticis et schismaticis, non Ecclesiae catholicae sunt adscripti."—Wernz, *Ius Decret.*, IV, n. 503, not. 6.

⁵ *Ius Decret.*, IV, nn. 502, 574.

⁶ Cappello (*De Sacram.*, III, n. 306) uses the Greek phrase only in connection with the impediment of Mixed Religion.

⁷ Cf. Zhisman, *Das Eherecht der orient. Kirche*, p. 506, not. 2.

§ III. HISTORICAL USAGE

24. Historically, the first term is "Disparity of Cult", though it was not in use until the twelfth century. The Fathers⁹ and the early councils do not employ a juridic term to designate their prohibitions,—they speak rather of "the marriages of the orthodox or faithful with infidels, gentiles, pagans, Jews, heretics, or schismatics". The title "*De Dispari Cultu*" seems to have been used first by Peter Lombard.¹⁰ Thereafter, the term remained for centuries to designate both the marriages of the baptized with the unbaptized, and those of Catholics with heretics or schismatics.

25. The authors were wont to distinguish between the two by adding differentiating words.¹⁰ Thus they added the term "antecedent" (referring to that disparity preceding a marriage), and "subsequent" (referring to that disparity taking place after the marriage). These terms were again distinguished. Antecedent Disparity of Cult in the *strict sense* designated that disparity existing between the baptized and the unbaptized; in a *broad sense* it connoted a difference of a profession of faith of two baptized persons, one of whom belonged to the Catholic Church, and the other to an heretical or schismatic sect.¹¹ Subsequent Disparity of Cult in the *strict sense* arose when one of two unbaptized parties (to the same marriage) received Baptism. In a *broad sense* it arose between two married baptized Catholics, upon one of the parties apostatizing from the Cath-

⁹ St. Ambrose uses the phrases "*disparis devotione*" and "*disparis fide*" in a rather free sense, not in the juridic sense as serving to designate an impediment. Cf. *De Abraham*, Lib. I, cap. 9, n. 84,—*MPL*, XIV, 451 (the passage is quoted in No. 37, note 28); *Epist. 19 Ad Vigilium*, — *MPL*, XVI, 984-985 (the passage is quoted in No. 36, note 24). The same may be said of the phrase "*qui veri Dei cultus esset prorsus ignarus*" used by Ead-baldus in his answer to King Edwin. See No. 53, note 20.

¹⁰ *Sent.*, IV, D. XXXIX.

¹⁰ The distinctions were not employed in the twelfth and early thirteenth centuries. In this brief period the one *diriment* impediment of Disparity of Cult included the marriages of Catholics with infidels, Jews, heretics, or schismatics.

¹¹ The authors also spoke of the "improper" and "proper" use of these terms. Cf. De Angelis, *Prael. Juris Can.*, Lib. IV, Tit. I, n. 21. Vlaming (*Prael. Juris Matr.*, n. 207) says that the terms "imperfect" and "perfect" were employed also in documents of the Holy See.

olic Faith, joining an heretical or schismatic sect, or becoming an adherent of Judaism or Mohammedanism.¹²

26. The term "Mixed Religion" (*Mixta Religio*) was, perhaps, not employed until the nineteenth century.¹³ Even in Papal letters, or in the instructions and decrees of the Congregations, the prohibition was under the heading of the title, "Mixed Marriages" (*matrimonia mixta* or *nuptiae mixtae*),¹⁴ or it was designated by longer expressions such as "the marriages of Catholics with those ascribed to heretical or schismatic sects." The term "*Mixta Religio*" in all probability has its more immediate origin in the term "*matrimonia mixta*". In the Code, the connotation of the terms "*Mixta Religio*" and "*Disparitas Cultus*" is fixed and definite.¹⁵

ART. II. BASIS OF DISTINCTION

27. The specific difference between the two impediments is centered, however, rather on the fundamental issues underlying both impediments than on the names by which they are known. The presence or absence of Baptism in the parties to the marriage is a basic consideration. Baptism marks the inequality or difference between a Christian and an infidel.¹⁶ Because of the nature of Baptism, which is a birth to the supernatural life, the difference between the baptized and the unbaptized is *radical*. On the other hand, Baptism marks the basic

¹² In the *strict sense*, subsequent Disparity of Cult established a condition that, together with given circumstances, might serve as a foundation for invoking the *Pauline Privilege*. Cf. c. 7, X, *de divortis*, IV, 19. This was not true, of course, of subsequent Disparity of Cult in the *broad sense*. Cf. Conc. Trident., sess. XXIV, *de Sacram. Matr.*, can. 5.—Denz., n. 975; Benedictus XIV, ep. *Singulari*, 9 Feb. 1749, § 11.—*Fontes*, n. 394.

¹³ One will look in vain among the older authors for the specific term "*Mixta Religio*".

¹⁴ "Quare cum mixta religione non est confundenda [Disparitas Cultus], etsi in nonnullis documentis *matrimonia mixta* dicantur ea quae cum disparitate cultus et quae cum mixta religione inita sunt."—Vermeersch-Creusen, *Epitome*, II, n. 344.

¹⁵ Cf. canons 1061, § 1; 1063, § 1; 1071; 1120, § 2. The phrase "*mixtae nuptiae*" continues to designate the marriages of Catholics with members of heretical or schismatic sects. Cf. canon 1064, nn. 1, 3. The phrase "*matrimonium mixtum*" in canon 2375 may, perhaps, refer to marriages contracted with either impediment.

¹⁶ The terms "Christian" and "infidel" are here used in a strict sense with reference to reception or the non-reception of Baptism.

likeness or parity that exists between a Catholic and a heretic or a schismatic,—the difference that exists between them is *modal*¹⁷ rather than radical. The *radical* difference arises on the basis of the *sacrament of faith*; the *modal* on the basis of the *profession of faith*.

N. B. In the chapters that follow, whenever the term “mixed marriages” is employed, it will refer to the marriages of Catholics with heretics or schismatics. The term “disparate marriages” will refer to the marriages of the baptized with the unbaptized, or, in the restricted sense of the impediment in the Code, i. e., the marriages of those baptized in the Catholic Church or converted to the Catholic Church, with the unbaptized.

¹⁷ The term “modal” does not mean, however, that a truly grave difference does not exist.

PART II
HISTORICAL DEVELOPMENT

FOREWORD

The available evidence for the Church's early legislation on the marriages of the faithful with unbelievers is derived largely from the Fathers, ecclesiastical writers, and particular councils.

Particular or provincial legislation and practice has, of itself, authority only over the limited region for which it was established.* The strictly chronological arrangement is inadequate to show its development into universal legislation and practice. A sameness of discipline exhibited in a chronological series of Spanish councils would have no force in France or Italy. On the other hand the degree of universality that a certain discipline possessed is more easily ascertained if attention is centered on discovering its presence in *all* the provinces of the heart and center of Christendom. In the present study, therefore, the chronological is subservient to the regional or geographical arrangement of the Church's early legislation.

* "Et propterea quamvis sola confirmatio Pontificia non efficiat, ut leges in illis latae ultra territorium suum extendantur, usu tamen, et traditione Ecclesiae approbatio, et confirmatio Papae operatur, ut etiam ultra territorium proprium extendantur, et deserviant pro norma Ecclesiae Universalis . . ." Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 184. Cf. Feije, *De Matr. Mixtis*, p. 60-61.

CHAPTER III

THE ECCLESIASTICAL PROHIBITIONS OF THE FIRST FIVE CENTURIES

28. The Church set forth to win souls for Christ in a world that was grossly pagan, in a world that sought to dismiss her by the sophistries of its philosophers, in a world that saw foolishness in the Cross of Christ. Heresies, moreover, arose on every side to imperil the faith of the early Christians. From the very beginning, therefore, the Church saw the necessity of providing safeguards that the faith of her members might remain one and unblemished. Although some associations of the Christians with the world as it existed were inevitable, the Church knew the dangers and sought to deter the faithful from them as much as possible. While many fled to the deserts to keep a virgin tryst with Christ, the larger number remained in the world to marry. Here arose a vital need for the Church's vigilance that the marriages of the faithful would not lead them to a shipwreck of their faith. The Church repeated the warnings of Sacred Scripture, and in her councils legislated practical prohibitions to such marriages as were perilous to the Faith.

ART. I. THE CHURCH IN THE EAST

29. Thus the Council of Laodicaea (between 343 and 381) decreed that the members of the Church ought by no means to unite their children "indifferently" with heretics in matrimony.¹ Fuchs draws attention to the proper interpretation of the word "indifferently" (*indiscriminatum*), urging that the council did not refer to a discrimination in the selection of heretics, but rather rebuked those to whom it was of little concern whether they gave their children in marriage to here-

¹ Can. 10: "Non oportere eos qui sunt ecclesiae, *indiscriminatum* suos filios haereticis matrimonio coniungere."—Mansi, II, 565.

tics or to Catholics.³ This opinion apparently receives confirmation in a later canon of this council, which ruled that it was not lawful to enter marriage with all sorts of heretics or to give their children to them; they were rather to receive them if they professed themselves as future Catholics.⁴

ART. II. THE CHURCH IN NORTHERN AFRICA

30. With his characteristic vehemence of expression Tertullian severely condemns the marriages of Christians with pagans,—at times almost insinuating their invalidity.⁵ Such marriages, he says, are against the divine law,⁶ and the Christians are not to enter them lest they be led into idolatry and unbelief.⁷ When he refers to St. Paul's words, "only in the Lord", he argues that they were written not as a matter of advice but in the sense of a command.⁸ Much of Tertullian's argument must, however, be received with caution since his reference to the words of St. Paul often serves as an occasion for a withering denunciation of second marriage.

³ The observation is cited and approved by Hefele, *Conciliengeschichte*, I, 756. Feije (*De Matr. Mixtis*, p. 30) gives the same interpretation to canon 67 of the Council of Agde (506) which repeated substantially the provisions of this council. See No. 42, note 1.

⁴ Can. 31: "Quod non oportet *cum omni haeretico* matrimonium contrahere, vel dare filios aut filias: sed magis accipere, si se Christianos futuros profiteantur."—Mansi, II, 569. The readings of this canon as given by Dionysius Exiguus (Mansi, II, 580) and Isidor Mercator (Mansi II, 588) have the word "*Christianos*" though the context of the canon in its dealing with heretics seems to demand the translation of "*Christianos*" by the word "Catholics". The phrase "*cum omni haeretico*" seems to offer a close parallel to the word "*indiscriminatim*" of canon 10. For a critical discussion of the Greek text of both canons 10 and 31 see Feije, *De Matr. Mixtis*, p. 48-53.

⁵ "Igitur cum quaedam istis diebus nuptias suas de Ecclesia tolleret, id est gentili coniungeretur, idque ab aliis retro factum recorderar, miratus ut ipsarum petulantiam aut consiliariorum praevaricationem, quod nulla scriptura eius facti licentiam profert."—*Ad uxorem*, Lib. II, cap. 2, —MPL, I, 1290. In referring to this passage, Binterim (*Denkwürdigkeiten*, VI, I, p. 432) thinks that by the word "*tolleret*" Tertullian meant to say that such marriages were invalid. While the expression is, perhaps, one of the most forceful of any found in the early centuries, yet it must be remembered that Tertullian often exaggerates and that too great a stress must not be laid on a word in a passage from his writings.

⁶ *De Monogamia*, cap. 7,—MPL, II, 938; *Adversus Marcion*, Lib. V, cap. 7.—MPL, II, 487.

⁷ *Liber de Corona*, cap. 13,—MPL, II, 96; *De Monogamia*, cap. 11,—MPL, II, 945-946; *Ad uxorem*, Lib. II, cap. 3,—MPL, I, 1292-1293.

⁸ *Ad uxorem*, Lib. II, cap. 1,—MPL, I, 1290.

St. Cyprian, Bishop of Carthage in the third century, likewise denounces the marriages of Christians with pagans as a prostitution of the members of Christ.⁸ He emphasized in particular the dangers arising from such unions, citing as proof the evil that befell Solomon.⁹

31. In the light of the writings of Tertullian and St. Cyprian, the statement of St. Augustine that in his time such marriages were not thought to be sinful, may, at first sight, afford an element of surprise.¹⁰ But if the entire context of the passage be examined carefully it will be apparent that St. Augustine did not express this as his own attitude nor as that of the Church, but rather as that of certain lax Christians who were of that opinion.¹¹ He inveighs, moreover, against the marriages of the faithful with heretics.¹²

32. The councils held in Northern Africa may be grouped together since their legislation concerned itself in each instance with the marriages of clerics and their children with those outside of the Church. Thus the Council of Hippo (393) forbade the children of clerics to marry pagans, heretics and schismatics.¹³

⁸ "... iungere cum infidelibus vinculum matrimonii, prostituere gentibus membra Christi."—*De Lapsis*, cap. 6.—*Corp. Scr. Eccl. Lat.*, Vol. 3, pars I, p. 240.

⁹ *Ad Quirinium*, Lib. III, cap. 62.—*Corp. Scr. Eccl. Lat.*, Vol. 3, pars I, p. 166.

¹⁰ See the following note and *De coniugiis adulterinis*, Lib. I, cap. 25.—*MPL*, XL, 468-469.

¹¹ "... Sed quoniam malorum christianorum mores, qui fuerunt antea etiam pessimi, habuisse non videntur hoc malum, ut alienas uxores ducerent viri, aut alienis viris feminae nuberent; inde fortasse apud quasdam Ecclesias negligentia ista subrepsit, ut in catechismis competentium nec quaererentur nec percuterentur haec vitia; atque inde factum est, ut inciperent et defendi . . . Hinc autem existimandum est non ea primum apparuisse in moribus quamvis malorum christianorum, quoniam beatus Cyprianus in epistola de Lapsis, cum deplorando et arguendo multa commemoraret, quibus merito dicit indignationem Dei fuisse commotam, ut intolerabili persecutione Ecclesias suam sineret flagellari, haec ibi omnino non nominat: cum etiam illud non taceat, et ad eosdem mores pertinere confirmet, iungere cum infidelibus vinculum matrimonii nihil aliud esse asserens, quam prostituere Gentibus membra Christi: quae nostris temporibus iam non putantur esse peccata; quoniam revera in Novo Testamento nihil inde praeceptum est, et ideo, aut licere creditum est, aut velut dubium derelictum."—*De fide et operibus*, Lib. I, cap. 19.—*MPL*, XL, 220-221. Cf. *De coniugiis adulterinis*, Lib. I, cap. 21.—*MPL*, XL, 465-466; Binterim, *Denkwürdigkeiten*, VI, I, p. 436.

¹² *Sermo XLVI, De Pastoribus in Ezechiel*, cap. VII.—*MPL*, XXXVIII, 278-279; *Epist.*, XXIII, n. 5.—*MPL*, XXXIII, 97 (See No. 3, note 3).

¹³ *Can. 12*.—*Mansi*, III, 921.

The same canon is repeated, practically verbatim, in the Third Council of Carthage (397).¹⁴ A somewhat similar prohibition for clerics, though not explicitly concerned with marriage, is repeated in the seventieth canon of the Fourth Council of Carthage (436).¹⁵ The Bishops assembled in these councils appear to have been concerned principally with the scandal that would naturally be given by clerics entering such unions. Since the opinion that such marriages were not unlawful was prevalent at this time the correction of the abuse would certainly have to begin with the clergy.¹⁶

ART. III. THE CHURCH IN SPAIN

33. In point of time, the Council of Elvira (306) was apparently the first council to legislate on the marriages of the faithful with unbelievers. At an early date the problem in Spain became particularly acute because of the large and influential Jewish population.¹⁷ In its reference to marriage, however, the council seems to be equally severe against heretics. "If heretics will not enter the Catholic Church, the daughters of Catholics must not be given to them in marriage." They are not to be given to Jews or to heretics because there can be no society between believers and unbelievers. If parents violate this law they must be withheld from communion for five years."¹⁸

34. Though marriages with pagans were also forbidden,¹⁹ the danger to the Faith from that source was not as great as it was from heretics and Jews. The pagans were not as bitter, nor did they possess the obstinate convictions characteristic of the Jews. It is worthy of note that the Council of Elvira marks the beginning of a severity in condemning the marriages of Christians with Jews that in the course of time seems to have taken the form of a diriment impediment.

¹⁴ Can. 12.—Mansi, III, 882.

¹⁵ Mansi, III, 957.

¹⁶ Cf. Feije, *De Matr. Mixtis*, p. 29-30.

¹⁷ Cf. Dale, *The Synod of Elvira*, p. 254-262.

¹⁸ The prescription of this clause is much the same as that incorporated into the Council of Laodicea a half century later.

¹⁹ Can. 16.—Mansi, II, 8. See also canons 17, 50, and 78.

²⁰ Can. 15: "Propter copiam puellarum, Gentibus minime in matrimonium dandae sunt virgines Christianae, ne aetas in flore tumens in adulterio animae resolvatur."—Mansi, II, 8.

ART. IV. THE CHURCH IN FRANCE

35. Hefele, in speaking of the Council of Arles (314), says that it may be considered a General Council of the Roman Patriarchate.²¹ In its eleventh canon the council decreed that Christian maidens, who had married pagans, were to be denied communion for a time.²² In its reference to young women the canon may be closely allied with the fifteenth canon of the Council of Elvira, though its addition of punishment is new.²³

ART. V. THE CHURCH IN ITALY

36. Much significance is contained in the prohibitions of St. Ambrose. In a letter to St. Vigilus he writes that there could scarcely be anything more grave than marriages with aliens to the Faith, for such unions were seared with the flames of lust and dissension, and branded with the crimes of sacrilege.²⁴ By impugning such marriages on the involved crimes of sacrilege he emphasizes a prohibition that centuries later was repeated almost verbatim by the Popes.²⁵ It is not entirely apparent, however, that in using the term "*sacrilegii flagitia*" St. Ambrose employed it in precisely the same sense as did the Roman Pontiffs. Their use of the term refers, perhaps, more immediately to the "profanation of the sacrament" and to the "*communicatio in sacris*".²⁶ While these elements may have been foremost in the mind of St. Ambrose, he would seem to

²¹ *Conciliengeschichte*, I, 202.

²² Mansi, II, 472.

²³ Hefele, *op. cit.*, I, 211.

²⁴ "... Nihil gravius, quam copulari alienigenae, ubi et libidinis et discordiae incentiva, et *sacrilegii flagitia* conflantur. Nam cum ipsum coniugium velamine sacerdotali, et benedictione sanctificari oporteat; quomodo potest coniugium dici, ubi non est fidei concordia? Cum oratio communis esse debeat, quomodo inter dispares devotione potest esse coniugii communis charitas? Saepe plerique capti amore feminarum fidem suam prodiderunt . . ." Epist. 19, *Ad Vigilum*,—MPL, XVI, 984-985.

²⁵ Benedictus XIV, Const. *Matrimonia*, 4 Nov. 1741,—Coll., n. 333; ep. encycl. *Magnae Nobis*, 29 Jun. 1748, § 2,—*Fontes*, n. 387; Pius VI, rescript. ad Card. Archiep. Mechlinien., 13 Jul. 1782, n. 1,—*Fontes*, n. 471; Pius VII, rescript. (ad ep. Galliar.), 17 Feb. 1809,—Migne, *Theol. Curs. Complet.*, XXV, 710; Gregorius XVI, allocut. *Officii memores*, 5 Jul. 1839,—*Fontes*, n. 492; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 1,—*Fontes*, n. 497.

²⁶ Cf. Eichmann, *Kath. Mischehenrecht nach dem C. I. C.*, p. 13-14.

include also other evils that were *consequent* upon such unions, rather than those immediately present in the very act of forming them.

37. His prohibition includes the marriages of the faithful with pagans, Jews and heretics, and he adduces the divine law in support of his reasons.⁷⁷ With regard to the marriages with pagans, however, he introduces a reason for their prohibition which is both striking and significant since it turns on the sacrament of Baptism and on the grace of the sacrament of marriage.⁷⁸ The passage is, perhaps, the only one to be found in the writings of the Fathers wherein the factor of Baptism is used in connection with this prohibition. Centuries later, the element of Baptism was to be of primary importance in determining the impediment of Disparity of Cult.

St. Zeno,⁷⁹ Bishop of Verona, and St. Jerome⁸⁰ stress the dangers that usually accompany such marriages. St. Jerome seems to be of the opinion that St. Paul strictly prohibited them.⁸¹

ART. VI. THE ECUMENICAL COUNCIL OF CHALCEDON

38. The Council of Chalcedon is the only Ecumenical Council that has legislated directly on the marriages of the

⁷⁷ *De Abraham*, Lib. I, cap. 9, n. 84.—*MPL*, XIV, 451; *Expositio in Ps. CXVIII*, Sermo 20, n. 48.—*MPL*, XV, 1499; *Expositio Evang. sec. Lucam*, Lib. VIII, n. 2.—*MPL*, XV, 1765.

⁷⁸ "Cave, inquam, gentilem aut Iudaeam atque alienigenam, hoc est, haereticam, et omnem alienam a fide tua uxorem arcessas tibi . . . Si Christiana sit, non est satis, nisi ambo initiati sitis sacramento baptismatis . . . Non possunt hoc dispares fide credere, ut ab eo quem non colit, putet sibi communii impartitam gratiam . . . Primum ergo in coniugio religio quaeritur."—*De Abraham*, Lib. I, cap. 9, n. 84.—*MPL*, XIV, 451. The passage does not indicate in any way that St. Ambrose regarded such marriages as invalid. Cf. *Astesani de Asta, Summa*, Lib. VIII, Tit. XV, art. 1.

⁷⁹ *Tractatus*, Lib. I, Tract. V, nn. 7-9.—*MPL*, XI, 307-311.

⁸⁰ St. Jerome is a witness of both the Eastern and Western discipline. His intimate association with Pope Damasus should justify the insertion of his testimony under the present grouping.

⁸¹ *Adversus Jovinianum*, Lib. I, n. 10.—*MPL*, XXIII, 225.

faithful with those outside of the Church.³³ In its fourteenth canon this Council forbade chanters and lectors (to whom marriage was permitted in certain regions) to marry heretical women. Those who already had children of such marriages and had had them baptized by heretics, were to bring these children into the communion of the Church. The unbaptized children were not to be baptized in an heretical sect, nor were they to be married to heretics, Jews, or pagans, unless such unbelievers would be converted to the Catholic Faith.³⁴

39. The force of the prohibition may at first sight appear to be somewhat limited since it speaks only of the lower order of clerics and their children. Yet the canon must be regarded in much the same light as the legislation of the councils of Northern Africa. The councils of prominent centers of Christendom³⁵ and the Fathers had been unanimous in prohibiting such marriages, though it appears that practice did not always con-

³³ The sixty-seventh and sixty-ninth canons of the Arabic Collection of the Council of Nicaea (Mansi, II, 975) have been cited at times to show the great antiquity of the diriment force of the impediment of Disparity of Cult. While the text of these canons seems to suppose the dirimency of the impediment, yet the argument drawn from them has little or no value. It is generally agreed that this Arabic Collection of Nicaea is spurious, and that the only authentic canons are the twenty usually attributed to this Council. Cf. Hefele, *Conciliengeschichte*, I, 367; Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 702. On the other hand see Scherer, *Handbuch des Kirchenrechtes*, II, p. 373, not. 7. Whoever compiled the collection evidently considered the marriages of Christians with infidels as invalid. But who was the compiler, and when and where was the collection made? The collection was not discovered to the Western world until the sixteenth century. No decisive evidence exists to show at what time it was known in the East. Trombellius (*Tract. de Matr.*, Tom. III, Dissert. IX, cap. II, art. 1, n. 14) says that these canons are very old and represent the early discipline of the Church. At best, the statement is vague. Binterim (*Denkwürdigkeiten*, VI, I, p. 444) states that they were known in the seventh century but he offers no conclusive proofs. Even if the canons were known at an early date the evidence is wanting to show that they had any function in the development of the law of the Church. They do, indeed, represent the mind of the man or men who made the spurious collection, but unless these canons can be shown to have had their influence on the mind and practice of the Church, they are of negligible value.

³⁴ Mansi, VII, 388. For the various versions of canon 14 of the Council of Chalcedon see Feije, *De Matr. Mixtis*, p. 4-6. In effect all the readings are substantially the same.

³⁵ The condition enacted by the Council of Chalcedon for licit entrance into marriages with those outside the Church was the same as that demanded at Elvira and Laodicea, namely, the conversion of the unbeliever. The faith of the children is an added concern of the Council of Chalcedon.

form to law.²⁶ In its concern over this laxity the Church at Chalcedon, as well as at Hippo and Carthage, directed its attention to a source of evil, the scandalous conduct of certain clerics.²⁷ This concentration represents rather a determined effort of the Church to remove the evil entirely than a toleration of such marriages among the laity.

ART. VII. SUMMARY

40. The marriages of the faithful with aliens to the Faith were, therefore, universally forbidden at the close of the fourth century.²⁸ The Council of Chalcedon in the fifth century merely enacted a practical measure to safeguard what had already been established as law in all the Christian communities. At this period there is no indication that a distinction existed universally between the marriages of Catholics with heretics or schismatics, and the marriages of Catholics with Jews and infidels. All marriages with those outside the Church were forbidden under one prohibition. Nor is there any apparent provision for dispensation. The instances of such marriages that are commonly cited²⁹ afford no information of a dispensation having been given; they exemplify rather the ultimate conversion of the unbeliever. The promise of conversion was the condition of licit entrance into such marriages.³⁰ The opinion of Westermarck,³¹ however, that such marriages were *encouraged*, seems to lack an historical foundation. It was almost inevitable that some such

²⁶ See No. 31, note 11.

²⁷ Cf. Feije, *De Matr. Mixtis*, p. 4, 7.

²⁸ Cf. Hergenröther, P., *Lehrb. des kath. Kirchenrechts*, p. 728; Scherer, *Handb. des Kirchenrechtes*, II, p. 407; Binterim, *Denkwürdigkeiten*, VII, II, p. 23-24. St. Leo the Great also gave a general warning as to the dangers of association with pagan women. (Cf. Sermo XVI, *De Ieiunio decimi mensis V.*, cap. 5.—*MPL*, LIV, 179.) The prohibition was not, however, in the form of a diriment impediment. Cf. Sanchez, *De Matr.*, Lib. VII, Disp. 71, n. 8 (and all modern authors).

²⁹ Cf. Binterim, *op. cit.*, VI, I, p. 451-456.

³⁰ In that age Baptism was often received late in life, a fact which may account for some marriages of the Christians with the catechumens.

³¹ *History of Human Marriage*, Vol. II, p. 58. Westermarck refers to Winroth, *Offentlig Rätt. Familjerätt; Aktenskapshindren*, p. 212.

marriages would take place⁴ for the early Christian communities were often small and in the midst of a pagan population. St. Augustine complains of the laxity of his age. The protests of the Fathers and the councils afford clear evidence that it was entirely foreign to the mind of the Church to encourage such marriages.

⁴ Binterim (*Denkwürdigkeiten*, VI, I, p. 452) calls attention to the fact that all the well known cases of such marriages are those of Christian women with pagan men. The Council of Elvira, too, refers to the "*copia puellarum*". The marked concern of the Church that Christian women should not enter into such marriages may receive some explanation in the fact that in Roman Law women were to follow the religion of their husbands. Cf. Vlaming, *Prael. Iuris Matr.*, I, p. 183, not. 2. Feije (*De Matr. Mixtis*, p. 29) in referring to the concern expressed by the Council of Elvira that Catholic women be not given in marriage to Jews and heretics, says: "Ratio est, quod filiae solebant nuptui tradi a parentibus, filii vero non ita."

CHAPTER IV

THE SIXTH TO THE TWELFTH CENTURY

41. The one prohibition that existed in the early ages of the Church to the marriages of Catholics with heretics, schismatics, pagans, and Jews, had been established primarily because of the attendant dangers to the Faith. Accordingly, as the presumption of this peril attached itself in a more definite and marked way to any one of the enumerated classes of unbelievers, the councils legislated with a proportionate severity. Yet it appears that the gradual evolution of the one prohibition into two distinct impediments left the original prohibition to the marriages of Catholics with heretics and schismatics substantially the same.

ART. I. MARRIAGES OF THE FAITHFUL WITH HERETICS

42. When the councils of the sixth and seventh centuries directed their attention to the marriages of Catholics with heretics and schismatics, their enactments represented repetitions of the canons of former councils rather than a development or formation of new elements to the prohibition already existing.¹

43. The most singular decree is found in the Council in Trullo (692) held after the Sixth Council of Constantinople. In its seventieth canon it erected a diriment impediment to the

¹ The collection made in Northern Africa by Fulgentius Ferrandus contains the Law of Laodicaea. Cf. *Breviatio Canonum*, nn. 180, 182.—*MPL*, LXVII, 958-959. The Council of Agde (506) in its sixty-seventh canon (Mansi, VIII, 336) repeated substantially the provisions of Laodicaea. For a discussion as to the authenticity of this canon see Feije, *De Matr. Mixtis*, p. 31, not. 1. In all probability it has a spurious origin. With regard to the dependent relation of this canon of the Council of Agde see Berardi, *Gratiani Can.*, Vol. I, p. 254; Feije, *op. cit.*, p. 30; Binterim, *Denkwürdigkeiten*, VII, II, p. 26. The thirteenth canon of the Council of Lerida (524) [Mansi, VIII, 614] contains a fragment of the legislation of Chalcedon. Cf. Binterim, *loc. cit.* Canon twenty of the Seventeenth Council of Toledo (694) [Mansi, XII, 106] depends for its wording and context on the canons of the councils of Agde, Laodicaea, and Elvira.

marriages of the orthodox with heretics.³ In the present study, however, the enactment is of little significance for the decree of the Council in Trullo, while exerting an influence in the Eastern Church for centuries,⁴ was disregarded in the Western Church, and even repudiated by Pope Sergius.⁵

44. It appears that marriages with heretics were not an infrequent occurrence among the Franks⁶ though Binterim argues that the early canons, by being incorporated into civil laws, were faithfully observed.⁷

ART. II. MARRIAGES OF THE FAITHFUL WITH PAGANS AND JEWS

45. The councils of this period exhibit no definite line of demarcation from the original prohibition regarding the marriages of the faithful with *pagans* and *infidels*. The real concern

³ "Non licere virum orthodoxum muliere haeretica coniungi, neque vero orthodoxam cum viro haeretico copulari. Sed et si quid eiusmodi ab ullo ex omnibus factum apparuerit, irritas nuptias existimare, et nefarium coniugium dissolvi . . ."—Mansi, XI, 975. Wernz, (*Ius Decret.*, IV, n. 504 cum not. 19) in estimating the date when Disparity of Cult became a diriment impediment, draws attention to this canon of the Council in Trullo as a possible starting point. Yet, from the wording and context of the entire canon it is not clearly evident that the marriages of the orthodox with *infidels* were included under the diriment impediment to the marriages of the orthodox with heretics. Though the marriages of Catholics with heretics were regarded as invalid by some authors of the twelfth century (cf. No. 66, note 6) there is no evidence that the opinion was in any way influenced by the enactment of the Council in Trullo. The Western Church, moreover, did not accept this discipline. Cf. Benedictus XIV, *Opera Inedita*, p. 432.

⁴ Cf. Vering, *Lehrb. des kath. orient. und prot. Kirchenr.*, p. 915.

⁵ Sanchez, *De Matr.*, Lib. VII, Disp. 28, n. 7; Pichler, *Jus Can.*, Tom. I, Lib. IV, Tit. I, n. 130; Reiffenstuel, *Jus Can. Univ.*, Lib. IV, Tit. I, n. 358; Feije, *De Matr. Mixtis*, p. 85; Wernz, *Ius Decret.*, IV, n. 576; De Becker, *De Spons. et Matr.*, p. 275.

⁶ Loening, *Das Kirchenr. im Reich der Merowinger*, II, p. 566, and not. 2. "Desiderius, rex Longobardorum, persuadere voluerat Carolo et Carlomanno regibus Francorum, ut eorum alteruter uxorem duceret Desideratam, filiam Desiderii, Arianam. In Epistola quam hac de re anno 770 ad eos dedit Stephanus IV haec leguntur: 'Nullus . . . qui mentem sanam habet, hoc vel suspicari potest, ut tales nominatissimi reges, tanto detestabili atque abominabili contagio implicentur: quae enim societas luci ad tenebras? aut quae pars fideli cum infideli'?"—Feije, *op. cit.*, p. 8.

⁷ *Denkwürdigkeiten*, VII, II, p. 27. As a reason for no tangible development in legislation he adduces an argument from the fact that no heresies of importance arose at this period,—that the early legislation, therefore, sufficed for the needs of the time.

of the councils was centered rather on the marriages of the faithful with *Jews*. The dangers arising from such marriages were deemed so great that in the course of time they appear to have given rise to a diriment impediment.

§ I. THE CHURCH IN SPAIN

46. The marked discipline against marriages with Jews had already received an impetus in the Council of Elvira. It was to grow in severity, especially in the succeeding councils of Spain. Thus the fourteenth canon of the Third Council of Toledo (589)¹ forbidding marriages with those outside the Church, directed its attention solely to such unions with Jews.

47. In the following century the discipline assumed an additional element at the Fourth Council of Toledo (633) where it was decreed that converted wives of Jewish husbands were to be separated from them unless they too became Christians. In any event, the children were to follow the faith of their Christian mother.² Though the enactment considers rather the separation from a union already contracted in Judaism than the antecedent invalidity of a marriage between a Christian and a Jew, it does offer striking evidence of the absolute abhorrence of the Church in Spain to the marital union of a Christian with a Jew. The renewed and vigorous condemnations in the subsequent councils of Toledo³ of marital or any other association with Jews, served as a foundation for the rise of a diriment impediment to the marriages of Christians with Jews.

48. In the eighth century Pope Hadrian I wrote to the Spanish Bishops deploring the fact that some Christians in Spain did not think it sinful to associate with Jews and un-

¹ Mansi, IX, 996.

² Canon 63: "Iudaei qui christianas mulieres in coniugio habent, admonentur ab episcopo civitatis ipsius, ut si cum eis permanere cupiunt, Christiani efficiantur. Quod si admoniti noluerint, separentur . . . Filii autem ex talibus nati existunt, fidem atque conditionem matris sequantur . . ." Barbosa (*Coll. Doct.—Decret. Gratiani*, Tom. V, Causa XXVIII, cap. X, n. 1) and Sanchez (*De Matr.*, Lib. VII, Disp. 73, n. 11) give as a reason for the restricted reference of the canon to *wives*, the fact of the greater danger of perversion due to the subjection of wives to their husbands.

³ Toletanum X (656), cap. 7.—Mansi, XI, 37; Toletanum XII, (681), cap. 9.—Mansi, XI, 1035-1036; Toletanum XVI (693), cap. 1.—Mansi, XII, 68-69; Toletanum XVII (694), cap. 8.—Mansi, XII, 101-102.

baptized pagans, and adds: ". . . *et illud QUOD INHIBITUM EST, ut nulli liceat iugum ducere cum infidelibus, ipsi enim filias suas cum alio benedicent, et sic populo gentili tradentur . . .*"¹⁰ By the use of the more general term "*infidelibus*" the Pope appears to refer to the universal prohibition of the Church covering all marriages of the faithful with those outside of the Church. The force of the phrase, "*quod inhibitum est*", has, therefore, no reference to the Spanish legislation against marriages with Jews, (a discipline which by this time may have taken on the form of a diriment impediment), but rather to the discipline of the universal Church.

§ II. THE CHURCH IN FRANCE

49. As in Spain, the Church in France was confronted with the same problem of the marriages of Christians with Jews. The legislation of the councils of this region appears to be even more severe. The nineteenth canon of the Second Council of Orleans (533) represents, perhaps, the clearest evidence of the probable development of the prohibition into a diriment impediment. "*Placuit ut nullus Christianus Iudaeam, neque Iudaeus Christianam in matrimonio ducat uxorem, quia inter huiusmodi personas ILLICITAS NUPTIAS esse censemus. Qui si commoniti A CONSORTIO HOC SE SEPARARE distulerint, a communione gratia sunt sine dubio submovendi.*"¹¹ Binterim is of the opinion that the word "*illicitas*" has the force of "*irritas*" since the Christians who enter such marriages are excommunicated if they will not separate from their Jewish consorts.¹² While the separation may, perhaps, be understood in the sense of a separation *from bed and board*, yet the context of the canon seems to favor Binterim's interpretation,—the very denial of the *ius coniugale*. The Second Council of Orleans appears, therefore, to offer the first instance of a *diriment* impediment to the marriages of Christians with Jews.

50. The Council of Auvergne (535) decreed that Christians were not to marry Jews under penalty of excommunica-

¹⁰ Ep. *Institutio universalis*, a. 785,—*Fontes*, n. 24.

¹¹ Mansi, VIII, 838.

¹² *Denkwürdigkeiten*, VI, I, p. 441-442.

tion."¹⁴ The canon itself seems to offer no indication that such marriages were regarded as invalid.¹⁵ The severity of the penalty and the council's proximity in time and place to the Second Council of Orleans may indicate, however, that the *invalidity* of marriages between Christians and Jews was taken for granted. Though the inference is somewhat hazardous the argument from silence must not be pressed too far. The Third Council of Orleans (538), held but five years after the second council, does not repeat the decree of its predecessor to the extent of invalidating such marriages,¹⁶ but by its silence it does not thereby revoke the discipline already established. It seems rather to emphasize the added punishment of excommunication.

51. A further indication of an accepted diriment impediment is derived from the thirty-first canon of the Fourth Council of Orleans (541) whereby a Jew marrying his Christian female slave, thereby lost his slave.¹⁷ The decree of separation does not appear to derive its greatest force from the fact that the woman was a slave, but from the fact that she was a Christian.

52. The Council of Meaux (845) recalled the ancient disciplinary measures that had been decreed against the Jews. It quoted the sixth canon of the Council of Auvergne, many of the enactments of the Fourth Council of Toledo, and several decrees of Roman civil law.¹⁸

Rhabanus Maurus, referring to the discipline concerning the marriages of Christians with Jews, quotes the eleventh canon of the Council of Arles, the seventy-eighth canon of the Council of Elvira, and the fourteenth canon of the Third Council of

¹⁴ Can. 6,—Mansi, VIII, 861.

¹⁵ Barbosa (*Coll. Doct.—Decret. Gratiani*, Tom. V, Causa XXVIII, cap. XVII) writes of this canon: "Vulgo notatur hic text. ad hoc quod Iudaeus contrahens matrimonium cum Christiana *separari statim debet*, ut per Masquard, *de Iudae. part 2, cap. 3, a num. 1.*" He adds three other authorities to substantiate the statement.

¹⁶ Can. 13,—Mansi, IX, 15. Dom Chardon (*Histoire du Sacrement de Mariage*, chap. XIII,—Migne, *Theol. Curs. Complet.*, XX, 1117), however, seems to attribute an invalidating force to this canon of the Third Council of Orleans, while regarding canon 19 of the Second Council of Orleans as merely referring to their unlawfulness.

¹⁸ Mansi, IX, 118.

¹⁷ Can. 73,—Mansi, XIV, 836-839.

Toledo. He does not comment upon these canons to indicate his attitude with reference to the validity of such marriages."

§ III. THE CHURCH IN ENGLAND

The problem in England was not the same as that in the Mediterranean countries. England at this time was confronted with paganism; the Mediterranean countries were menaced by the Jews."

53. When the pagan King Edwin wished to marry the Christian Ethelburga he was opposed by her brother, Eadbal-dus.¹⁸ Even Pope Boniface V (625) wrote to King Edwin urging him to renounce his paganism entirely¹⁹ and communicated his desire to Ethelburga that she bring her pagan husband to the Christian faith.²⁰ Though his words do not in any way insinuate the invalidity of the marriage, (the condition for its licit entrance had already been fulfilled), it is significant that the Pope in an individual instance deemed it necessary to write both the king and queen concerning their marriage.

§ IV. THE CHURCH IN ITALY

54. The First Council of Rome (743) held under Pope Zacharias anathematized a Christian who would give his daughter in marriage to a Jew. The same censure was decreed for a widow who would marry a Jew, unless the Jew would be converted and baptized.²¹

§ V. THE CHURCH IN GERMANY

55. The evidence derived from a council held under the saintly Henry II of Germany is of no particular value. Very

¹⁸ *Poenitentialia*, cap. 26-27.—MPL, CX, 490.

¹⁹ "The Jew came to England in the wake of the Norman Conqueror. That no Israelites had ever dwelt in this country before the year 1066 we dare not say; but if so, they have left no traces of their presence that are of importance to us."—Pollock-Maitland, *History of English Law*, I, 468.

²⁰ "... non esse licitum Christianam virginem pagano in coniugem dari, ne fides et sacramenta coelestis Regis consortio profanaretur regis, qui veri Dei cultus esset prorsus ignarus."—Beda Ven., *Hist. Eccl. Gentis Angl.*, Lib. II, cap. 9. The clause "*ne fides et sacramenta . . . profanaretur*" places an unusual emphasis on the dignity of the sacrament.

²¹ Beda Ven., *op. cit.*, Lib. II, cap. 10.

²² "Quomodo ergo unitas vobis coniunctionis inesse dici poterit, si a vestrae fidei splendore, interpositis detestabilis erroris tenebris, ille remanserit alienus?"—Beda Ven., *op. cit.*, Lib. II, cap. 11.

²³ Can. 10.—Mansi, XII, 384.

little of the deliberations of this council has been preserved. Mansi gives a mere outline of it.²⁴ Hefele is also brief but mentions that this council forbade the marriages of Christians with pagans.²⁵ The very brevity and vagueness of the evidence does not permit a conclusion further than that such marriages were forbidden and, perhaps, punished with excommunication.

§ VI. THE CIVIL LAW

56. The provisions of Roman Law referring to the marriages of Christians with non-Christians restricted their concern to the marriages of Christians with Jews. The decree of the Emperor Constantius (339) threatened capital punishment to those Jews who would marry Christian women.²⁶ The Theodosian law branded such marriages as adulterous.²⁷ Opinions are somewhat divided as to the real force of these decrees. Some would seem to deny that the marriages in question were regarded as invalid.²⁸ Others, however, admit that these laws did establish a diriment impediment.²⁹ Though the imposed penalties or the words of the decrees do not, of themselves, clearly

²⁴ Concilium Tremonienae (1005).—Mansi, XIX, 279-281.

²⁵ In referring to the testimony of Thietmar on this council Hefele says: "Den Ort gibt er nicht an, und widmet ihr überhaupt nur ein einziges Sätzchen des Inhalts: durch Synodalentscheidung habe der König die Ehen zwischen Christen und Heiden verboten, und die Zuwiederhandelnden mit dem geistlichen Schwert zu strafen befohlen. Es waren damit wohl die Ehen der Christen mit den benachbarten Slaven gemeint."—*Conciliengeschichte*, IV, 663.

²⁶ ". . . ne Christianas mulieres suis iungant flagitiis vel, si hoc fecerint, capitali periculo subiugentur."—*C. Th.*, XVI, 8, 6. An interesting quotation reflecting the mind of the Emperor Constantine toward the marriages of Christians with infidels is cited by Binterim, *Denkwürdigkeiten*, VI, 1, p. 446-448. Cf. Zhishman, *Das Eherecht der orient. Kirche*, p. 510.

²⁷ "Ne quis Christianam mulierem in matrimonio Iudaeus accipiat, neque Iudaeae Christianus coniugium sortiatur. Nam si quis aliquid huiusmodi admiserit adulterii vicem commissi huius crimen obtinebit, libertate in accusandum publicis quoque vocibus relaxata."—*C. Th.*, III, 7, 2. This law was taken up in the Justinian Code.—*C.*, I, 9, 6.

²⁸ "Leges autem Imperatorias dicendum est, dicta matrimonia ut adulterii punire propter gravitatem peccati, non propter nullitatem matrimonii . . ."—Estius, *In IV Lib. Sent. Comment.*, Dist. 39, § 3. This passage from Estius is cited and apparently approved by Pope Benedict XIV, ep. *Singulari*, 9 Feb. 1749, § 7.—*Fontes*, n. 394.

²⁹ Cf. Pappiani, *De Sacram.*, Tract. VII, § 53; Schulte, *Handb. des kath. Eherechts*, p. 223; Scherer, *Handb. des Kirchenrechtes*, II, p. 372, and not. 6.

postulate a diriment impediment, it is well to bear in mind that Roman Law did not distinguish between prohibitive and diriment impediments. A marriage contracted against the prescriptions of the law *was not recognized as valid by Roman Law*; every impediment was, therefore, a diriment impediment.

57. What is of importance is to determine the relation of such legislation to the practice and law of the Church. Pope Benedict XIV calls attention to the fact that these laws did not bind the Church.⁵⁰ On the other hand, they did appear to lend an impetus to the growth of the custom which came to regard such marriages as invalid.⁵¹ Particular councils were wont to incorporate enactments of Roman Law against the Jews.⁵² Again, civil laws incorporated the decrees of particular councils. Thus the sixty-third canon of the Fourth Council of Toledo was incorporated into the laws of the Visigoths.⁵³ It appears, therefore, that the civil law not only contributed to the formation of a diriment impediment to the marriages of Christians with Jews, but also reflected in some measure the growth of the custom in the particular regions where it became a diriment impediment.

ART. III. SUMMARY OF DEVELOPMENT

58. On the ground that the punishments of Roman Law were not invoked, Loening, in speaking of the relation of the prescriptions of the councils in France to Roman Law, seems to be of the opinion that the severity of the discipline against

⁵⁰ Ep. *Singulari*, 9 Feb. 1749, § 7.—*Fontes*, n. 394. Tournely (*Prael. Theol. de Sacram. Matr.*, Quaest. VIII, concl. 2) and Pappiani (*loc. cit.*) are of the opinion that the Church consented to this legislation. This may be true at a later date but the evidence of ecclesiastical approval is wanting for the period when the laws were formed.

⁵¹ "Videtur tamen ab illa aetate increbrescentibus prohibitionibus Episcoporum, et concurrentibus legibus Imperatorum fundamentum iactum, unde cultus disparitas per consuetudinem ad effectum dirimendi Matrimonium erecta est . . ."—Rupprecht, *Notae Hist. in Univ. Jus Can.*, Lib. IV, Tit. I, n. 149.

⁵² Concilium Meldense (Meaux), can. 73.—Mansi, XIV, 836-839. Cf. Regino Prumiensis Abbas, *De Ecclesiasticis Disciplinis*, Lib. II, CXLIII,—*MPL*, CXXXII, 311; Augustine, *Commentary*, V, p. 180.

⁵³ Cf. Berardi, *Gratiani Can.*, Vol. I, p. 192.

marriages of Christians with Jews gradually fell into desuetude.²⁸ The assumption, however, that the severity of conciliar legislation in France was mitigated because it substituted excommunication for the punishments of Roman Law, would seem to be somewhat gratuitous. *Every council cited for Spain, France, and Italy enacted rigorous laws to deter the faithful from such marriages. The severity of the discipline is the dominant note of the period.*²⁹ In Spain such marriages were on the verge of being regarded as invalid (if, actually, they were not) in the seventh century. In France there is sufficient evidence to postulate a diriment impediment in the sixth century. The close relation between the legislation of Spain and France would eventually tend to a uniformity of discipline in both regions.³⁰

²⁸ "Diese canones drohen Excommunication an, wenn die Ehe auf Ermahnung des Bischofs hin nicht gelöst werde, 'si commoniti a consortio hoc separare distulerint'. Sie setzen also Gültigkeit und Straflosigkeit solcher Ehen nach weltlichem Recht voraus. Da die Juden nach römischem Rechte lebten, so hatten auch auf Ehen zwischen ihnen und Franken die römischen Strafbestimmungen Anwendung finden können. Uebrigens scheinen auch in Rom, obgleich der Cod. Just. die alten Strafgesetze wiederholte, solche Ehen im 8. Jahrhundert straflos gewesen zu sein. Römisches Concil von 743, c. 10."—*Das Kirchenr. im Reich der Merowinger*, II, p. 567, not. 3. But see also *Jus Pont.*, VII (1927), 122, not. 1; infra No. 58, note 36. The fact that the First Council of Rome employed an "anathema" instead of an "excommunicatio" does not seem to support the contention that such marriages were free from punishment. It is very probable that the "anathema" represented at that time even a greater severity than the "excommunicatio". Cf. Hyland, *Excommunication*, p. 24. It is of more than passing significance that this council, the first in Italy to legislate on the marriages of the faithful with Jews, used a term more severe than councils of other regions. It was not necessary, moreover, for the Church to incorporate Justinian legislation.

²⁹ Though the Council in Trullo in the Eastern Church does not deal with the problem, the prescriptions of the Justinian Code, if they bound anywhere, would have their greatest force in the region about Constantinople. Cf. Zhisman, *Das Eherecht der orient. Kirche*, p. 509-510. No conciliar evidence is available from Northern Africa for that Church had been destroyed by the Vandals in the fifth century. In England or Germany the problem does not appear to have existed before the eleventh or twelfth centuries.

³⁰ "Die fränkische und spanische Kirche anerkannte den rechtlichen Bestand einer zwischen Juden und Christen geschlossenen Ehe seit dem 6. Jahrhundert nicht mehr. Wurde auch deren Nichtigkeit mit klaren Worten nicht ausgesprochen, so wurde bei Excommunication Trennung aller zwischen Juden und Christen bestehenden Verbindungen aufgetragen und diesbezüglich zwischen Ehe und Concubinat nicht unterschieden."—Scherer, *Handb. des Kirchenrechtes*, II, p. 372. Vide etiam Linneborn, *Grundriss des Eherechts*, p. 199, not. 5. Other authors, while admitting the presence of a diriment impediment in Spain and France, deny that it ever bound the entire Church.

In Italy the prohibition was given the sanction of an "anathema".

59. It appears quite reasonable, therefore, to infer that the diriment impediment of Disparity of Cult had its beginning in a diriment impediment to the marriages of Christians with Jews." Though the discipline of Spain and France in the sixth and seventh centuries did not bind all Christendom,²⁸ yet if the ample time of three to four centuries be allowed for the custom to take firm root also in Italy, it does not seem improbable that the impediment was recognized as diriment in the tenth or eleventh centuries for every community where the problem existed.²⁹ Spain, France, and Italy formed the heart of Christendom. No evidence is available, however, that a diriment impediment existed also for the marriages of the faithful with other infidels. The prohibition of the early centuries remained also in this period as a mere prohibition.

Cf. Alexander, Nat., cap. IV *De Sacram. Matr.*, art. 8.—*Theol. Dogm. et Mor.*, Tom. II; Wernz, *Ius Decret.*, IV, n. 504; Chelodi, *Ius Matr.*, n. 79.

²⁸ Cf. Glossa ad c. 10, C. XXVIII, 2, 1; Thomas Aq., *Summa Theol.*, IIIa suppl., q. 59, art. 3, ad 2; Sanchez, *De Matr.*, Lib. VII, Disp. 73, nn. 11-12; Scavini, *Theol. Mor.*, Lib. III, n. 795.

²⁹ See No. 58, note 35.

³⁰ A curious passage regarding the marriages of Christians with Jews is found in the writings of Abelard: "Christianus etiam Iudaeam posset ducere, si recompensatio inde sequeretur."—*Epitome Theologiae Christianae*, cap. 31.—*MPL*, CLXXVIII, 1747. Though the meaning of the clause "si recompensatio inde sequeretur" is not altogether clear, it is interesting to note that later when Albertus Magnus speaks of dispensation, he defines it as "relaxatio iuris in opere, aliqua de causa utilitatis vel necessitatis, PER QUAM IUS IN OPERE RELAXATUM RECOMPENSABITUR."—Brys, *De Dispens.*, p. 260, not. 3. It does not appear improbable, therefore, that Abelard's "recompensatio" may perhaps be understood in the sense of a dispensation. Abelard seems, however, to have regarded the marriages of Christians with pagans (perhaps also with Jews) as valid. Cf. Linneborn, *Grundriss des Eherechts*, p. 199, not. 6; De Smet, *De Spons. et Matr.*, p. 520, not. 4.

CHAPTER V

THE TWELFTH TO THE SIXTEENTH CENTURY

60. For several centuries Islam had gradually advanced farther and farther upon the boundaries of Western civilization. The Moors had penetrated into Spain until they finally possessed the larger part of the peninsula. Sicily had been taken by the Saracens; inroads had been made even on the southern shores of Italy. From the East the Mohammedans were advancing closer by repeated victories over the Christians.

61. It was not until the eleventh century that Christendom seemed to realize the full menace, and then with a suddenness of awakening it arose in a mighty force to free itself of the peril. In Spain the Moors were pressed back to the confines of the small kingdom of Granada. With the meteoric appearance of the Normans the Saracens were driven from the kingdom of Sicily. Before the close of the century two great Crusading armies had been sent to redeem the Sanctuaries of the Holy Land.

62. On the northern boundaries of the Empire the pagans had stubbornly resisted all invitations of conversion and had even harassed the neighboring Christian communities. It was not until the twelfth and early thirteenth centuries that their resistance was gradually subdued.

63. With the accumulated laxities in Church discipline of the preceding age, other dangers had arisen within the very centers of Christendom. The Waldensian sect, that had begun as a protest to the existing evils, came to be imbued with the most flagrant heresy. The Cathari, or Albigenses, went even to further extremes in doctrine and practice that were subversive not only of Christian faith and morality but even of the foundations of civil society. For a time they existed in scattered communities, but in the twelfth century they commanded a considerable following in southern France and northern Italy,—spreading into England, Germany, Bohemia, and

Poland. Civil rulers themselves became alarmed at their excesses and with the failure of the persuasive methods of the Church a crusade was sent against them. Under the leadership of Simon de Montfort the crusade crushed the power of the Albigenses. The vigilance of the established Inquisition held further eruptions in check.

64. Western Christendom was revived in a spirit of faith. Its heart pulsed with the beginnings of noble ventures; its mind was bent on a great ideal, a great unity,—the unity of the Faith. The very dangers that beset it on every side but whetted the desire for its realization. Everything that endangered or was destructive of this unity was to be exterminated. The possibility of a marriage with those alien to the Faith was, therefore, a thought inconceivable. The abhorrence of such marital unions converted itself into a diriment impediment. The center of Christendom had already regarded the marriages of the faithful with Jews as invalid,—it now came to regard their marriages with *anyone outside of the Church as invalid*.

ART. I. THE TWELFTH CENTURY

65. When Gratian brought forth his monumental Concordance he incorporated the prescriptions of the early centuries of the Church on the marriages of the faithful with heretics, pagans and Jews.¹ A passage from St. Ambrose² he prefaced with the *dictum*: “. . . *Illa itaque auctoritate IUBENTUR SEPARARI AB INVICEM qui contra Dei ecclesiae decretum copulati sunt, utpote INFIDELES CUM FIDELIBUS, consanguinei cum consanguineis, vel affines cum affinibus. HII OMNES, si sibi invicem copulati fuerint, SEPARANDI SUNT.*” The wording and context of the *dictum* seems to justify the opinion that Gratian deemed the marriages of the faithful with infidels as invalid,³ though some authors do not agree with this interpretation, or at

¹ C. 10, 15, 16, 17, C. XXVIII, q. 1; C. XXXI, q. 2; c. 15, D. XXXII.

² C. 15, C. XXVIII, q. 1—(*De Abraham*, Lib. I, cap. 9, n. 84).

³ Mercerus, *Comment. in Tertiam part. S. Thomae, suppl.*, Quaest. 59, prop. 1, n. 3; Scherer, *Handb. des Kirchenrechtes*, II, p. 373, not. 7; Sägmüller, *Lehrb. des kath. Kirchenr.*, Buch IV, § 139, n. 1; Linneborn, *Grundriss des Eherechts*, p. 199, not. 6; Prümmer, *Theol. Mor.*, III, n. 823.

least regard it as doubtful.⁴ The fact that the incorporated passage from St. Ambrose does not demonstrate the implication of the *dictum* offers no serious difficulty. There was no authentic canon of any council, no passage from any of the Fathers, that Gratian might have used to show the invalidity of marriages with *infidels*. The very absence of such evidence may of itself offer an explanation of the wording and the context of the *dictum*.

66. It is quite probable, moreover, that by the term "*infideles*" Gratian included *all*, without exception, who were not Catholics. Yet this fact scarcely affords a cogent reason for tempering the more obvious contextual significance of the expression "*separandi sunt*".⁵ The authors of the twelfth century who followed him included also the marriages with heretics in the diriment impediment.⁶ The inclusion of all aliens to the

⁴ Cf. Wernz, *Ius Decret.*, IV, n. 503, not. 20; Leitner, *Lehrb. des kath. Eherechts*, p. 184; Chelodi, *Ius Matr.*, n. 79.

⁵ In view of the popularity that the *Decretum Gratiani* enjoyed among canonists, the observation of Pope Benedict XIV is well taken when he calls attention to the fact that it did not bind the Church.—*ep. Singulari*, 9 Feb. 1749, § 9,—*Fontes*, n. 394.

⁶ Peter Lombard does not, perhaps, teach this so clearly, yet he makes no distinction of discipline for pagans, Jews or heretics. He seems to include all these classes under the one diriment impediment: "*Post haec de dispari cultu videndum est. Haec est enim una de causis, quibus personae ILLEGITIMAE FIUNT AD CONTRAHENDUM MATRIMONIUM . . . Item Ambros. Cave Christiane Gentili vel Iudaeo filiam tuam tradere: cave ne Gentilem vel Iudaeam vel alienigenam, id est, HAERETICAM, ET OMNEM ALIENAM A FIDE TUA, uxorem accersas tibi . . . Ex his aliisque pluribus testimoniis apparet non posse contrahi coniugium ab his qui sunt DIVERSAE RELIGIONIS ET FIDEI.*"—*Sent.*, IV, D. XXXIX, A. Bernard of Pavia is quite explicit: "*Dispar cultus impedit matrimonium contrahendum et DIRIMIT CONTRACTUM, si ab initio intercesserit, v. g. fidelis aliquis paganam, iudaeam vel HAERETICAM accipere in coniugium non potest; quod si acceperit separatur . . . Hic haeretici nomine solus ille accipitur, qui falsam de fide opinionem gignit vel sequitur; in hoc enim solo potest disparis cultus impedimentum notari.*"—*Summa Decret.*, p. 291-292. Tancred is of a like opinion: "*Sequitur de dispari cultu, scilicet, quando unus eorum est Catholicus et alter HAERETICUS, vel unus Christianus et alter iudaeus, vel paganus, qui contrahere volunt, quando sunt DISPARIS PROFESSIONIS, non potest contrahi matrimonium inter eos, et si contrahunt NULLUM EST MATRIMONIUM.*"—The passage is cited by Featherston, *Disparity of Cult*, p. 28. Chelodi's opinion: "*At iam Petrus Lombardus, Rolandus, Tancredus, aliique saec. XII dirimens esse docent, RESERVATO IMPEDIENTI PRO HAERETICIS.*" (*Ius Matr.*, n. 79), seems to be at variance with the preceding quotations, and with the fact that some of the Glossators deemed that the marriages of Catholics with heretics were invalid. Cf. Leurenus, *Jus. Can. Univ.*, Lib. IV, quæst. 116; Sägmüller, *Lehrb. des kath. Kirchenr.*, p. 560, not. 5.

Faith in the diriment impediment marks a sudden and singular change,—as unique as the century that was responsible for it. Yet it represented rather an intense reaction toward the dangers to the Faith than a true expression of the mind of the Church. The wholesale inclusiveness of the impediment lacked an *ultimate* theological and canonical foundation.

67. Perhaps the prevailing teaching of the twelfth century appeared at least in some minor capacity in the question of the Bishop of Farrara when he asked whether a lapse into heresy constituted a canonical ground for the Catholic's entering another marriage. The answer of Pope Innocent III called attention for the first time to the *fundamental difference* existing between the marriages of the *baptized* and the *unbaptized*.⁷ It clearly asserted the doctrine that, while a marriage of the unbaptized was a *matrimonium verum*, a marriage of the baptized was in addition a sacrament, a *matrimonium ratum*, effected through the sacrament of Baptism. Because of its sacramental character through Baptism, a marriage of the baptized could not, therefore, be dissolved on the ground of a lapse into heresy even though the contumely of the Creator be greater.⁸

ART. II. THE THIRTEENTH TO THE SIXTEENTH CENTURY

68. Though the answer of Pope Innocent III was not concerned with an antecedent impediment it served, nevertheless, as a guide whereon the great scholastics of the thirteenth century were to base their teaching regarding the marriages of the faithful with aliens to the Faith. Hitherto, the development in particular legislation, and even widespread custom, had struck its root in the presumption of danger to the Faith.⁹ The theologians of the thirteenth century went further to turn their attention to the very requirements of the sacrament of marriage. Since a parity arising from the reception of Baptism was required for the very existence of a "*matrimonium ratum*" it followed that the *sacrament* of faith was a more fundamental issue than the *profession* of faith. A marriage between the bap-

⁷ Cf. Smismiewicz, *Die Lehre von den Ehehind. bei P. Lomb.*, p. 129.

⁸ C. 7, X, *de divortiis*, IV, 19.

⁹ Cf. Santi, *Prael. Juris Can.*, Lib. IV, Tit. I, n. 175; Sägmüller, *Lehrb. des kath. Kirchenr.*, Buch IV, § 139, n. 1

tized and the unbaptized represented a disparity that frustrated the realization of a "*matrimonium ratum*". In the teaching of Albertus Magnus,¹⁰ St. Thomas,¹¹ St. Raymond of Pennafort,¹² St. Bonaventure,¹³ William Durandus,¹⁴ and Duns Scotus,¹⁵ this disparity served as the *ultimate* basis of a diriment impediment. On the other hand, the requirements of a "*matrimonium ratum*" were fulfilled in a marriage of two baptized persons even though a disparity of a *profession* of faith existed. This disparity was regarded as a *prohibitive* impediment."

69. In their restatement of the limits and foundation of a diriment impediment, the authors of the thirteenth century departed, therefore, from the opinion of the writers of the twelfth. In view of the fact that their teaching prevailed in the centuries that followed, the complete omission in the *Corpus Iuris Canonici* of any reference to a diriment impediment of Disparity of Cult is somewhat surprising. The lack of legisla-

¹⁰ ". . . tamen peccatum non ex magnitudine sua habet impedire matrimonium, sed potius ex contrarietate quam habet ad fundamentum vel actum."—*Comment. in IV Sent.*, Dist. XXXIX, art. II, ad 4.—*Op. Omnia*, Vol. XXX, 429.

¹¹ ". . . matrimonium est sacramentum; et ideo quantum pertinet ad necessitatem sacramenti, requirit paritatem, quantum ad sacramentum fidei, scilicet baptismum, magis quantum ad interiorem fidem."—*Summa Theol.*, IIIa suppl., q. 59, art. 1, ad 5.

¹² *Summa*, Lib. IV, Tit. X.

¹³ ". . . Si autem sit infidelis, quia caret fidei Sacramento, utpote baptismo; quia Sacramentorum ecclesiasticorum et fidelium ianua et fundamentum est baptismus, fidelis, qui contrahere habet secundum Sacramenta Ecclesiae, si cum tali contrahat, nihil facit, etiam si sit fidelis, dum tamen non habeat baptismum, unde dirimit contractum."—*Comment. in IV Lib. Sent.*, Dist. XXXIX, art. 1, q. 1.—*Op. Omnia*, Tom. IV, 833.

¹⁴ *Spec. Iuris*, Lib. IV, Partic. 4, Tit. de divortiis, n. 2.

¹⁵ ". . . nec honestum est fidelem contrahere, cui contractui non sit annexum Sacramentum fidei Christianae, et etiam ubi non sit bonum Sacramenti, id est, indissolubilitas, quia coniugium Christianorum natum est habere haec bona."—*Quaest. in IV Lib., Sent.*, Dist. XXXIX, Quaest. un., art. 2.—*Op. Omnia*, Vol. XIX, 510.

¹⁶ ". . . non tamen ordinatur ex contrarietate contra fundamentum matrimonii omne segregans a consortio fidelium, et ideo non dissolvit contractum matrimonium; sed verum est quod contrahi non debet."—Albertus Magnus, *op. cit.*, Dist. XXXIX, art. IV. ". . . si aliquis fidelis cum haeretica baptizata matrimonium contrahat, verum est matrimonium, quamvis peccet contrahendo, si sciat eam haeticam; sicut peccaret, si cum excommunicata contraheret; non tamen propter hoc matrimonium dirimeretur . . ."—Thomas Aq., *loc. cit.* St. Raymond of Pennafort, St. Bonaventure, William Durandus, and Duns Scotus (isti auctores ad *loc. cit.*) uphold the same teaching.

tive evidence" may, perhaps, be partially explained upon the fact that the numbers of the unbaptized in the Christian countries of Western Europe were, in all probability, limited largely to Jews, against whom the popular feeling ran so high that its excesses called forth the condemnation of the Holy See. The very spirit, moreover, that prompted the Crusades against the Mohammedans precluded the possibility of frequent marriages with them."

ART. III. SUMMARY OF DEVELOPMENT

70. All authors are agreed that the diriment impediment of Disparity of Cult arose rather from a universal custom than from any positive, written law of the Church," but in assigning a date when the custom became universal, they are arrayed in a wide divergence of opinion, covering a span of eight centuries. Some authors select a date as early as the sixth century."

¹⁷ The seventeenth canon of the Synod of Mainz (1233) supposes an impediment of Disparity of Cult when it mentions it as one of the impediments to be disclosed *in facie ecclesiae*. The German text in Hefele (*Conciliengeschichte*, V, 1028) designates it as "*verschiedene Religion*" to which "*dispar cultus*" is added in parenthesis. Though its definite nature is not indicated, its enumeration with the impediments that were regarded as diriment may indicate that it too was regarded as diriment.

¹⁸ Zhishman (*Das Eherecht der orient. Kirche*, p. 511-512), however, cites rather frequent examples of members of the royalty in the East entering such marriages.

¹⁹ Cf. Benedictus XIV, ep. *Singulari*, 9 Feb. 1749, § 10.—*Fontes*, n. 394; Sanchez, *De Matr.*, Lib. VII, Disp. 71, n. 8; Bellarminus, Lib. II *de Sacram. Matr.*, cap. XXIII.—*Op. Omnia*, Tom. V, 119; Pirhing, *Jus Can.*, Tom. IV, Lib. I, Sect. VI, n. 164; Schulte, *Handb. des kath. Eherechts*, p. 224; Gasparri, *De Matr.*, n. 695.

²⁰ Mercerus (*Comment. in Tertiam part. S. Thomae*,—suppl., Quaest. 59, prop. 1, n. 3) says that it arose after the year 500. Pope Benedict XIV (*Opera Inedita*, p. 430-431) places the beginning of the custom in the Patristic age (cf. Prümmer, *Theol. Mor.*, III, n. 823), though his own reference to the marriages of saints Monica, Anastasia, and Cecelia, does not offer conclusive foundation for the opinion. Elsewhere (ep. *Singulari*, 9 Feb. 1749, § 10.—*Fontes*, n. 394) he says that it had existed for many centuries with the force of law. Binterim (*Denkwürdigkeiten*, VI, I, p. 444) seems to favor the seventh century though in another instance (*ibid.*, p. 445) he refers to the ninth and tenth. Others select the period from the seventh to the twelfth century. Cf. Wernz, *Jus Decret.*, IV, n. 504; Cappello, *De Sacram.*, III, n. 426. Philipp Hergenröther (*Lehrb. des kath. Kirchenrechts*, p. 761) prefers the eighth; Petrovits (*New Church Law on Matrimony*, n. 219) the ninth to the twelfth. Scherer (*Handb. des Kirchenrechtes* II, p. 372-373) says that it arose before the twelfth century. Cf. etiam Alexander, Nat., cap. IV *De Sacram. Matr.*, art. 8.—*Theol. Dogm. et Mor.*, Tom. II.

Most authors accept the twelfth century,⁷¹ though a few place it as late as the thirteenth.⁷²

71. It appears that a century earlier than the eleventh would afford little more than fragmentary evidence of the probable existence of a diriment impediment for the marriages of Christians with Jews. Those who accept the twelfth century offer by way of confirmation the testimony of the writers of that century. What then is the import of such evidence? Are the twelfth century authors witnesses to an existing custom? They appear to be for they do not speak with the accents of innovators,—they exhibit no hesitation in their opinions.⁷³ The unanimous testimony of the theologians and canonists in the centuries that followed to the existence of a diriment impediment of Disparity of Cult seems to leave no reasonable doubt of its universal existence in the twelfth century. Yet the diriment impediment of the twelfth is not altogether the same as that of the succeeding centuries. Perhaps the custom of the twelfth remained; perhaps the thirteenth century also accepted it but gave it a new foundation and pared it of its excessive inclusiveness.

72. Was the custom of the twelfth century accepted by the Church? The practically unanimous opinion of the authors in denying that the marriages of Catholics with heretics were ever regarded as invalid by the Church in the West, suggests a negative answer. Yet St. Bonaventure⁷⁴ and Duns Scotus⁷⁵

⁷¹ Cf. Estius, *In IV Lib. Sent. Comment.*, Dist. 39, § 3; Billuart, *Curs. Theol.*, Tom. XIII, Dist. VII, art. 10; Pappiani, *De Sacram.*, Tract. VII, cap. IV, § 53; Gasparri, *De Matr.*, n. 695; Esmein, *Le mariage en droit canonique*, I, p. 216; De Smet, *De Spons. et Matr.*, n. 592 cum not. 4, p. 520; Vlaming, *Prael. Iuris Matr.*, n. 286; Farrugia, *De Matr.*, n. 168. Cardinal Bellarmine (*Lib. I De Sacram. Matr.*, cap. XXIII.—*Op. Omnia*, Tom. V, 119) says that it arose at least four hundred years before his time.

⁷² Leitner, *Lehrb. des kath. Eherechts*, p. 184; Noldin, *Theol. Mor.*, III, p. 665, not. 1; Augustine, *Commentary*, V, p. 180.

⁷³ The custom may have had its beginnings in the century preceding. No evidence, however, exists for its universality.

⁷⁴ “. . . Sic et in nova [lege] impedit non simpliciter sive de se, sed ob vitiationem periculi et diversitatem Sacramenti baptismi et inhibitionem ecclesiastici statui, quae ortum habet a duobus praedictis.”—*Comment. in IV Lib. Sent.*, Dist. XXXIX, art. 1, q. 1.—*Op. Omnia*, Tom. IV, 833.

⁷⁵ “. . . Sed de iure positivo Ecclesiae simpliciter non potest [contrahi], quia Ecclesia illegitimavit fidelem, non simpliciter, sed respectu infidelis . . .”—*Quaest. in IV Lib. Sent.*, Dist. XXXIX, Quaest. un., art. 2.—*Op. Omnia*, Vol. XIX, 510.

of the thirteenth century, and Durandus of St. Porcian⁸⁸ of the fourteenth, refer to the *law of the Church*. They do not speak of it as something novel; they seem rather to take it for granted as though it were not even a matter for discussion. They seem almost to suppose a formal positive law of the Church yet they never refer to it, nor quote it,—nor is there any record of such a law within this period. They may be justifying their teaching by an indirect reference to the legislation of the earlier centuries,⁸⁹ attributing to it the logical deductions of their teaching as completing what had not been explicitly enacted. Perhaps they refer to that custom which had gained the force of law in the twelfth century? More probably, their testimony indicates at least a *tacit acceptance* by the Church of the custom as it existed with the force of universal law in the thirteenth century.

73. That the Church in the thirteenth century accepted only a *prohibitive* impediment to the marriages of Catholics with heretics or schismatics, as distinct from the diriment impediment affecting the marriages of the baptized with the unbaptized, seems to be clearly implied in a decree of Pope Innocent IV wherein the dowry of a woman, knowingly marrying a heretic is confiscated,—yet the existence of a valid marriage is supposed.⁹⁰

In the fourteenth century the prohibition (without an invalidating clause) of such marriages enacted in the particular council of Pressburg (1309)⁹¹ was confirmed and approved in 1346 by Pope Clement VI.⁹²

⁸⁸ Durandus says that as far as the law of the Church is concerned, a disparity of cult existing between two *infidels* would not invalidate their marriage, “. . . et idem esset de fidelibus quod possent contrahere cum infidelibus, NISI OBVIARET STATUTUM IURIS et dictum Apostolici.”—*In Sent. Comment. lib. IV, Lib. IV, Dist. XXXIX, Quæst. 1, n. 10.*

⁸⁹ The authors of the later centuries frequently refer to early legislation to demonstrate the constant abhorrence of the Church. Even the Holy See has at times referred to the enactments of early councils. The following instruction of the Holy Office refers to the councils of Laodicea, Agde, and Chalcedon: S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 3.—*Fontes*, n. 1112.

⁹⁰ C. 14, *de hæreticis*, V, 2, in VI^o.

⁹¹ Can. 8,—Mansi, XXV, 222.

⁹² Cf. Binterim, *Denkwürdigkeiten*, VII, II, p. 28; Feije, *De Matr. Mixtis*, p. 9; Wernz, *Ius Decret.*, IV, n. 576.

74. The acknowledgment by the Church of a distinct prohibitive impediment to the marriages of Catholics with heretics, confirms the opinion that the Church accepted only that diriment impediment which was limited to the marriages of the baptized with the unbaptized. Since this arose only as late as the thirteenth century, it may, therefore, be stated without serious hesitation that the two impediments as distinct from each other, one,—the diriment impediment of Disparity of Cult, the other,—the prohibitive impediment of Mixed Religion, were accepted by the Church in the *thirteenth century*.

75. With the severe discipline of the late Middle Ages against heresy and heretics; in the light of the stringent laws against all association with the unbaptized as they were represented for the most part by Jews and Saracens, the possibility of entering such marriages was not even discussed. The question of dispensation did not arise. It was altogether foreign to the mind of an age bent on the *extermination* of heresy and infidelity.²¹

²¹ Cf. Scherer, *Handb. des Kirchenrechtes*, II, p. 407; De Becker, *De Spons. et Matr.*, p. 275; Wernz, *Ius Decret.*, IV, n. 576; *AkKR*, XIV (1865), 322.

CHAPTER VI

THE SIXTEENTH CENTURY TO THE CODE

With the religious revolt of the sixteenth century and the missionary awakening of the Church following the discovery of America, the question of dispensation became suddenly an issue of instant importance.

76. The missionary activities in the Orient and in the newly discovered continents of the Western Hemisphere saw conditions develop similar in many respects to those which had existed in the early centuries of Christianity. Again the same problem arose concerning the relation of the new converts to those who still remained in paganism, and marriages between Christians and pagans would again engage the attention of the Church.

77. Severe as had been the discipline regarding such marriages in the Middle Ages, the Church took cognizance of missionary conditions and granted faculties to the Apostolic Vicars of these regions to dispense from the impediment of Disparity of Cult. The faculty was to be used only in regions where pagans outnumbered the Christians, and upon the existence of grave causes. There was also to be due precaution that such marriages be contracted without contumely of the Creator, and that the children be educated as Catholics.¹ While the provision

¹ "Etenim novimus a Clemente IX. 23 Ianuar. 1669, concessam fuisse episcopo Heliopolitano tam pro se, quam pro aliis vicariis apostolicis in regnis Sinarum, Tunchini, Cocincinae, aliisque finitimis facultatem, ad annos quindecim proxime futuros 'dispensandi super impedimento disparitatis cultus, gravibus tamen ex causis, in quibus, dispensandum erit, et in locis tantum ubi sunt plures infideles quam Christiani, ita ut in eo matrimonio postmodum, quatenus absque Creatoris contumelia fieri possit, contrahentes remanere libere et licite valeant, prolesque exinde suscipiendas legitimis decernendi, super quibus eorumdem vicariorum apostolicorum conscientia oneratur, et praedictae dispensationes gratis concedantur'."—Perrone, *De Matr.*, Tom. II, cap. VII, art. 2. Vide etiam Benedictus XIV, 15 Feb. 1756.—*ibid.*; S. C. S. Off. (Albaniae), 19 Sept. 1671,—*Fontes*, n. 749; (Tunkin. Orient.), 5 Sept. 1736,—*Fontes*, n. 790; 29 Jan. 1767,—*NRT*, XV

for the safety of the faith of the Catholic party and the children was strictly enjoined, it appears to be stated more in the form of a general principle of observance than in the form of a definite and specific engagement. There is no mention of an exclusive method of observance to bring about the realization of this condition. In all probability it may have been left to the prudence and good judgment of those enjoying the faculty of dispensing. By custom and tradition the religious authority of a family in these countries was vested completely in the husband.⁸ In the absence of a provision for formal *cautiones*, as they are known today, the Catholic faith of the husband may frequently have been accepted as a sufficient safeguard.⁹

78. Europe, on the other hand, presented a scene of confusion and disorder. Heresy was making fearful inroads in England, Germany, and Poland. Even certain sections of France had been infected. The Church was confronted as never before with the issue of holding the loyalty of those who still kept the Faith, and of bringing back those who had deserted.

79. The prohibitions of ancient councils to mixed marriages were to be renewed and enforced for such marriages would occasion only further apostasies. How could the Church depart from its traditional policy towards heretics and heresy?¹⁰

(1883), 423-424; 12 Jan. 1769,—*Fontes*, n. 822; S. C. de Prop. F., 28 Iulii 1760,—*Coll.*, n. 432 (a more complete text is given by Perrone, *loc. cit.*); instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760,—*Coll.*, n. 435. See infra No. 244 note 66. While Pope Clement XI in 1702 granted faculties of the most surprising extent to De Tournon, sent as Apostolic Legate to the missionary regions of the Orient, it appears somewhat strange that in his matrimonial faculties there is no mention of the faculty to dispense from the impediment of Disparity of Cult. (Cf. P. Norbert, *Mémoires Historiques Présentées au Souverain Pontife Benoit XIV sur les Missions des Indes Orientales*, Luques, 1745, Tom. I, par. I, p. 115-129). Did he possess the faculty by virtue of the fact that he was given every faculty extended to the Vicars Apostolic? In all probability he did.

⁸ See No. 285, note 28.

⁹ In view of the peculiar conditions in China an extraordinary dispensation for that country as to the manner of exacting the *cautiones* was given by the Holy Office on April 5, 1918. Cf. Winslow, *Vicars and Prefects Apostolic*, p. 106-107. Vide etiam S. C. S. Off. (Pekin.), 29 Apr. 1891,—*Fontes*, n. 1134.

¹⁰ To understand the legislation of the Church on mixed marriages it is necessary to understand the attitude of the Church toward heresy. In her mind, heresy, apart from the hatred of God, is the most heinous of sins. (Cf. Thomas Aq., *Summa Theol.*, IIa-IIae, q. 10, art. 3; Malderus, *De*

Were she in any way to permit a Catholic to marry a heretic it would seem equivalent to an acknowledgment of the right of heresy to exist. No, she would dispense from no impediment existing between a Catholic and a heretic unless the abjuration of heresy preceded.* Where the abjuration did not take place, or where only the impediment of Mixed Religion existed, the Church would not dispense except for reasons of a manifest public concern, i. e., for the marriages of Catholic rulers with someone of their rank but of an heretical form of religion.* For a Catholic to associate himself with a heretic

Virtutibus Theol., q. 10, art. 3). Other sins, indeed, deprive the soul of the life of grace (Conc. Trident., sess. VI, *de justificatione*, can. 27,—Denz., n. 837), yet faith, which is the root of this life, still remains (*ibid.*, can. 28,—Denz., n. 838). But to tear out the root of the supernatural life is a violence that leaves the soul only with the indelible mark of the sacrament of faith as a terrible reproach to the vandal of the faith. This is the awful malice of heresy or apostasy,—it is high treason to Christ.

* "Et licet de stylo, huius Supremæ. et Universalis Inquisitionis committerentur Nunciis, vel Ordinariis tales dispensationes cum clausula, *Abiurata prius hæresi*, Innocentius Decimus sanctæ memoriæ mandavit, ut in futurum prius haberetur testimonium abiurationis, antequam concederetur dispensatio."—Albitius, *De Inconstantia in Fide*, Cap. XVIII, n. 44. Cf. Clemens XI, 16 Jun. 1710,—Migne, *Theol. Curs. Complet.*, XXV, 628; Benedictus XIV, ep. encycl. *Magnæ Nobis*, 29 Jun. 1748, §§ 4-5.—*Fontes*, n. 387; ep. *Ad tuas*, 8 Aug. 1748, § 6.—*Fontes*, n. 389; Pius VI, rescript. ad Card. Archiep. Mechlinien., 13 Iulii 1782, n. 1.—*Fontes*, n. 471; S. C. S. Off., 16 Jun. 1710.—Migne, *op. cit.*, XXV, 628; Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, nn. 13-39; Scherer, *Handb. des Kirchenrechtes*, II, p. 408; De Angelis, *Prael. Iuris Can.*, Lib. IV, Tit. I, n. 22; Chelodi, *Ius Matr.*, n. 58. As a precaution against the possibilities of deception the Holy See demanded that petitions for dispensation mention either the fact that both parties were Catholics, or that the abjuration had been given. Cf. Albitius, *op. cit.*, Cap. XVIII, n. 45. The heretic's abjuration as a condition for dispensation from impediments of relationship was at times designated in the early seventeenth century as the *causa pro Germania*, upon which Corradus remarks: "Haec causa . . . pariter in unum tendunt: nam movetur Papa ad dispensandum, ut matrimonium in pares Religione contrahatur [cum in illis partibus non satis tutum sit, cum quibusvis personis matrimonium contrahere] . . . Hanc causam audio non admitti hodie in Dataria pro Germania, sed tamen pro nobilibus Orthodoxis . . ."—*Praxis Dispens.*, Lib. VII, cap. II, nn. 96-99. The same author (*loc. cit.*) gives examples of three petitions for dispensation which were granted in the early seventeenth century: one for affinity, and two for consanguinity. In each of these petitions the marriage had been contracted invalidly and with heretics. The mention of the "*abiuratio hæresis*" occurs in each. The abjuration was demanded also of schismatics. Cf. Schulte, *Handb. des kath. Eherechts*, p. 251.

* Cf. Benedictus XIV, ep. encycl. *Magnæ Nobis*, 29 Jun. 1748, § 5.—*Fontes*, n. 387; De Justis, *De Dispens. Matr.*, Lib. II, cap. XV, n. 16; Albitius, *De Inconstantia in Fide*, Cap. XVIII, n. 45.

in a union as intimate as that of marriage would, in a certain sense, be abetting the cause of heresy, even though it be material and indirect.⁷ All who lent such favor could be proceeded against as "*suspecti de haeresi vel eiusdem fautores*".

80. Though the Council of Trent had enacted no legislation referring directly to mixed marriages, indirectly, such marriages were prohibited by the decree "*Tametsi*", which demanded under pain of invalidity that marriages be celebrated before the proper pastor (or his, or the Ordinary's delegate),

⁷ Throughout the Middle Ages the discipline regarding any association whatever with heretics had been most severe. While this discipline was somewhat modified by Pope Martin V (Const. *Ad evitanda* [in Conc. Constantien.], a. 1418.—*Fontes*, n. 45), the constant aversion of the Church to such associations may readily explain De Lugo's opinion (*Tract. de Virr. Fidei Div.*, Disp. XXII, Sect. II, n. 30) which maintained that one of the principal elements of the prohibitive impediment to the marriages of Catholics with heretics was the punishment of heretics. See infra No. 115.

* Cf. Albitius, *De Inconstantia in Fide*, Cap. XXXVI, nn. 163, 185, 187-191, Cap. XXII, n. 129; Suarez, Trac. I, *De Fide Theol.*, Disp. XXIV, Sect. I, n. 9; Dandino, *De Suspectis de Haeresi*, Cap. III, Sect. I, Subsect. I, § IV, nn. 1-2; Petra, *op. cit.*, Tom. IV, Const. XII, Ioannis XXII, nn. 2-5. When Pope Paul III in 1542 established the Inquisition as a Congregation and as a Tribunal the question of mixed marriages became its immediate concern. "Huic porro congregationi expresse attribuebatur iudicium de haereticis quomodo libet suspectis de haeresi, deque eiusdem fautoribus. Iamvero communiter censebatur contrahentem matrimonium cum persona heretica esse suspectum de fide et contra illum inquisitores posse procedere."—Arendt, "De Exclusiva S. Officii Competentia circa Matrimonium Mixtum", *Jus Pont.*, VII (1927), 122. Early instructions and responses of the seventeenth century coming from the Holy Office indicated likewise the competency of this Congregation upon questions concerning disparate marriages. Yet it is doubtful whether the Holy Office from the very beginning reserved to itself the exclusive right of judging of the validity of disparate marriages. It appears that in at least one instance the Congregation of the Council gave a declaration of nullity. "Aliter suadere posset canonicum illud impedimentum, quod vocatur cultus disparitas; nam absolute prohibetur coniugium baptizati cum non baptizato . . . irritumque declaratur . . . probavitque Sacra haec Congregatio [Concilii] die Septembris 1623 per decretum illud: Sacra Congregatio [Concilii] censuit, matrimonium, ut proponitur, cum infideli contractum nullum prorsus, atque irritum esse."—S. C. Conc. (Brixien. Dubia Baptismi, et Matrimonii), 27 Aug. 1796,—*Thes.*, LXV, 218. Admittedly, too much stress may not be placed on this evidence since the full context of the decision is not given. The Congregation of the Council may have acted merely in the capacity of transmitting the decree which may have been given by the Holy Office [?], though the text scarcely warrants such an assumption, for on the next page of the *Thesaurus* (*Thes.*, LXV, 219) the consultor refers to the Holy Office to confirm the evidence he has already given from the Congregation of the Council. The Congregation of the Council, moreover, gave decisions pertaining to the impediment of Mixed Religion. See No. 80, note 11.

and at least two witnesses.* Only Catholic pastors could be *parochi proprii*¹⁰ and since they were forbidden to assist at marriages between Catholics and heretics unless an abjuration preceded or a Papal dispensation had been given,¹¹ all avenues to mixed marriages seemed to be closed.

81. Yet in spite of the obstacles which stood in the way of mixed marriages in the universal law of the Church and in a host of particular synods of the sixteenth and seventeenth centuries¹² many diversities in discipline existed from the very beginning of the religious revolt in the hinterland of Catholic influence,—in Germany, England, Poland, and the Netherlands. Here mixed marriages were contracted with such frequency and at the same time without an abjuration or Papal dispensation that among many canonists and theologians of

* Conc. Trident., sess. XXIV, *de reform. matr.*, cap. 1.—Mansi, XXXIII, 152-153. Schulte (*Handb. des kath. Eherechts*, p. 243) draws attention to the fact, that such marriages were contrary, moreover, to the urgent admonition of the same decree that both parties receive the sacraments of Penance and the Eucharist. It seems to be laboring the point too far, however, to say that the Tridentine legislation was enacted primarily against heretics. Cf. Dandino, *op. cit.*, Cap. III, Sect. I, Subsect. VI, n. 21. There can, however, be no doubt that the decree comprehended all marriages between those subject to the Latin Church, whether it be a question of a marriage between two Catholics, a Catholic and a heretic, or two heretics. Cf. Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. II, Ioannis XXI, n. 20. Feije, *De Matr. Mixtis*, p. 94-121.

¹⁰ " . . . Unde est, ut etiam priventur [parochi qui postea in haeresim incidunt] beneficio Parochiali, et consequenter matrimonia coram ipsis inita, nulla sunt, perinde ac si coram non Parocho facta fuissent, ut resolvit Sac. Congr. Conc. quae sub die 19 Maii 1572 censuit: *Nullum esse matrimonium contractum coram Parocho haeretico, si Decretum Concilii cap. I de reformat. Matrimon. publicatum fuerit in Parochia, et lapsi erant triginta dies a die primae publicationis* . . ."—Petra, *op. cit.*, Const. XII, Ioannis XXII, n. 27.

¹¹ "Unde Parochis permissum non est iis assistere, ut pluries respondit Sac. Congr. Concilii, praesertim sub die 22 Iunii 1624 . . . dum censuit, quod sive alter tantum ex coniugibus sit haeticus, sive ambo, nullatenus debeat Parochus huiusmodi matrimoniis assistere. Cum enim a Iure Canonico prohibita est, et illicita, permissum non erit Parochis eis assistere, et sua praesentia auctorizare, nisi pro tali contractu ineundo Summi Pontificis dispensatio concurrat, . . . ut etiam respondit eadem Sac. Congregat. in *Dubio Iurisdictionis Capellanorum Exercitus* die 6 Mart. 1694 ubi cum dubitaretur, An milites Acatolici. contrahentes cum Mulieribus Catholicis teneantur servare formam a Concilio praescriptam; Sac. Congreg. respondit: *Affirmative, sed ulterius indigere dispensatione, ut praedicta matrimonia licite contrahantur.*"—Petra, *op. cit.*, Const. XII, Ioannis XXII, n. 8. Cf. Albitius, *De Inconstantia in Fide*, Cap. XVIII, n. 47.

¹² Cf. Binterim, *Denkwürdigkeiten*, VII, II, p. 30-33; Feije, *De Matr. Mixtis*, p. 33-48; Scherer, *Handb. des Kirchenrechtes*, II, p. 408.

name" this laxity came to be accepted as a custom established contrary to the law of the Church.¹⁸

82. Amid such uncertainties and informalities there was no provision for formal *cautiones*, as they are known today, nor was there question of the necessity of a formal canonical cause. True, even the authors who accepted the custom insisted that no mixed marriages could be permitted without a grave reason and especially those which would represent a violation of the divine or natural law, but the norms deduced for the lawfulness of such marriages were based rather upon the application of reflex principles than upon an adherence to formal observances. It was a discipline wholly devoid of such formalities as dispensations, formal canonical causes, or *cautiones*,—a situation perhaps somewhat surprising to us of a modern day, yet one that would readily develop in the perilous conditions of countries where the Old Church and the new Religion were meeting and uncertain which would prevail.¹⁹ It was a period in which the Holy See seemed to be beset with misgivings and uncertainties as to the mold and form which her discipline would assume.

¹⁸ Though the postulation or admission of the contrary custom does not appear to have originated with Sanchez (*De Matr.*, Lib. VII, Disp. 72, n. 5) yet he seems to have lent it considerable weight. Thereafter it was accepted by many illustrious authors. Cf. Pontius, *De Matr.*, Append., cap. VIII, n. 4; De Lugo, *Tract. de Sacram. in genere*, Disp. VII, n. 225; *Tract. de Virt. Fidei Div.*, Disp. XXII, Sect. II, n. 16; Schmalzgrueber, *Jus Eccl. Univ.*, Tom. IV, Pars II, Tit. VII, n. 148; Castropalao, *Op. Mor.*, Tract. XXVIII, *De Spons.*, Disp. 4, Punct. 11, nn. 10-11; Salmanticenses, *Curs. Theol. Mor.*, Tract. *de Matr.*, Cap. XII, Punct. VI, n. 69; Laymann, *Theol. Mor.*, Lib. V, Tract. X, Pars IV, cap. XIV, n. 2; Alphonsus, *Theol. Mor.*, Lib. VI, n. 56; Dandino, *De Suspectis de Haeresi*, Cap. III, Sect. I, Subsect. I, § IV, n. 12; Pirhing, *Jus Can.*, Tom. IV, Tit. I, Sect. VI, n. 166; Cornelius a Lapide, *Comment. in Sacram Script.*, Tom. IX, ad I Cor., VII, 39. A few, however, dissented. Cf. Reiffenstuel, *Jus Can. Univ.*, Lib. IV, Tit. I, nn. 366-370; Pichler, *Jus Can.*, Tom. I, Lib. IV, n. 130; Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, nn. 9-10, 13-15; Mazzei, *De Matr. personarum div. Relig.*, cap. II, § IX. De Coninck (*De Sacram.*, Tom. II, Disp. 31, Dub. 3, n. 45) is very hesitant in accepting it.

¹⁹ Lessius had taught that the custom of a diriment impediment of Disparity of Cult had never passed to the Orient, and that, therefore, the marriages between the baptized and the unbaptized of those regions were valid without dispensation. Pope Benedict XIV called attention to the error and reasserted the universality of the law. Cf. ep. *Singulari*, 9 Feb. 1749, § 19.—*Fontes*, n. 394; *Opera Inedita*, p. 431.

¹⁸ See No. 104, notes 53-54.

83. Even Cardinal Albitius, grown gray in the service of the Inquisition, the very touchstone of orthodoxy, seemed to recognize the existence of a kind of double discipline. In his opinion mixed marriages among the common people might be contracted without Papal dispensation in those regions where heresy existed with impunity,¹⁶ and the decisions forbidding the assistance of pastors were to be understood as not applying to such conditions.¹⁷ Nay more, he would permit pastors to impart the nuptial blessing.¹⁸ But on no condition would he subscribe to the opinion sponsored by Cardinal De Lugo¹⁹ who had so completely accepted the custom in these regions regarding mixed marriages among the common people that he was at a loss to explain why Catholic rulers living in those countries seemed to regard themselves bound to seek a dispensation when marrying heretics.²⁰

84. An entirely different discipline, says Cardinal Albitius, existed for the marriages of Catholic rulers with heretics. Here the welfare of the Church and of the Catholic faith of kingdoms and of states was in far greater jeopardy than in the mixed marriages of the common people.²¹ It was still the day of the formula which wrought such havoc for the peace of the world,—“*cuius regio, eius et religio*”. The Church, therefore, insisted upon the necessity of abjuration or dispensation.

85. The negotiations in such proposed unions were practically equivalent to the processes involved in diplomatic treaties. To read the stories of such transactions is to enter into the

¹⁶ *De Inconstantia in Fide*, Cap. XVIII, nn. 43-44, 47-48; Cap. XXXVI, n. 203.

¹⁷ Sed haec declaratio debet intelligi, ut habeat locum in iis locis, in quibus non vivunt haeretici permixtum impune cum Catholicis, quia ubi impune vivunt, Parochus Catholicus potest assistere etiam matrimonio haereticorum, cum post Concilium Constantien. Haeretici nec in Sacris, nec in Politicis negotiis vitandi sint, nisi sint denunciati.”—*De Inconstantia in Fide*, Cap. XVIII, n. 48.

¹⁸ *Loc. cit.* Pope Clement VIII had, however, forbidden the imparting of a blessing for such marriages. Cf. Benedictus XIV, *De Synodo Dioec.*, Lib. VI, cap. V, n. 5; *Rituale Romanum*, Suppl. pro Prov. Am. Septentr. Foed., p. 10. See infra No. 388, note 66.

¹⁹ There were evidently others too in Rome who shared De Lugo's opinion. Cf. Albitius, *op. cit.*, Cap. XXXVI, n. 163.

²⁰ De Lugo, *Tract. de Virt. Fidei Div.*, Disp. XXII, Sect. II, n. 16; *Tract. de Sacram. in genere*, Disp. VIII, n. 225.

²¹ *De Inconstantia in Fide*, Cap. XXXVI, n. 205. Cf. Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, n. 17.

councils of kings, and to be entangled in the politics of Europe, where it seems that the controversy over a dispensation from the impediment of Mixed Religion became the turning point of the discussions. The stipulations, exactions, guarantees, and signatures were all of the deepest concern to the Holy See. These it would demand, these it would examine to see if sufficient safeguards had been provided for the faith of the Catholic party, of the children, and even of the subjects under their present or future rule.

86. The first record of such a proceeding concerns Henry of Bavaria who without dispensation had married his Calvinist cousin Catherine of Navarre, the sister of Henry IV of France. The impediment of Mixed Religion, writes Spondanus,²⁸ was of far greater concern to the Holy See than that of Consanguinity. Pope Clement VIII was altogether unwilling to dispense until Catherine would at least promise to become a Catholic. Even though she began to take instructions, and Henry had gone to Rome to seek the dispensation personally, it was granted only with the greatest reluctance and after years of discussion.²⁹ Catherine died before the dispensation could be executed, upon which Spondanus offers the reflection: "*Singulari et inscrutabili providentia divina.*"³⁰

²⁸ "*Potissima difficultas erat de diversitate religionis. Quamvis enim cognatio in gradibus prohibitis secundum leges Ecclesiasticas irritaret per se matrimonium; facilis tamen est dispensatio, cum causa. At diversitas religionis, etiamsi ea sola inter christianos baptizatos non irritet matrimonium contractum; impedit tamen ne contrahi possit absque gravissimo peccato partis catholicae, ob periculum seductionis, ac perversionis, et pravae institutionis liberorum, rixarumque, et odiorum quae facile inter coniugatos inde oriuntur: quae causae sunt, propter quas eiusmodi matrimonia prohibita sunt; et quarum ratione fixus in eo manebat Clemens, ut non dispensaret cum Barrensi, nisi prius Catharina haereism eiuraret.*" (Quoted by Feije, *De Matr. Mixtis*, p. 9-10.)

²⁹ Pope Clement VIII in granting the dispensation wrote to Catherine: ". . . Atque una spe freti, ut nostra erga te benignitate inducaris ad cognoscendam veritatem, ad quam Nos te in primis antea hortati sumus, et frater tuus Rex Christianissimus, et Dux Bariensis et universa Ecclesia Catholica te invitant; Dispensationem, quam litteris tuis a Nobis humiliter petiisti, matura nonnullorum Venerabilium fratrum nostrorum Sanctae Romanae Ecclesiae Cardinalium, et Theologorum, et Iuris Canonici peritissimorum virorum consultatione adhibita, et certa forma praescripta, prout in re tanti momenti fieri debuit, quanquam ut verum ingenue fateamur, propter ipsius difficultatem, et novitatem quodammodo renuentes, et inviti concessimus . . ."—Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 208.

³⁰ Cited by Juenin, *Comment. de Sacram.*, Dissert. X, Q. VII, cap. VI, art. 3. Cf. Albitius, *op. cit.*, Cap. XXXVI, n. 206.

87. The efforts of King James I of England to effect a union with Spain through the marriage of his son, Charles, to the Infanta, Donna Maria, exemplify well the endless negotiations, hesitations, stipulations, and guarantees which were required to overcome the one outstanding difficulty that rested in the difference of religion.²⁸

88. Philip III of Spain was reluctant to see his daughter a mere child of twelve, enter a royal court where she might easily be seduced from the Catholic Faith. He placed the matter before Pope Paul V, who commended his stand and directed that only upon Charles' conversion could the union be countenanced.²⁹

89. Negotiations were renewed with the accession of Philip IV who looked with favor upon the marriage, and petitioned the Holy See for a dispensation. In his eagerness, James I had also sent Catholic envoys to the same purpose, to whom the Pontiff replied that the dispensation could not be given unless it were for the benefit of the Church. James had promised much to Philip III but as yet he had done nothing. There might be a sufficient cause if he were to relieve the Catholics of England from the pressure of the penal laws.

90. James I lost no time in following this suggestion and instructed the judges to issue pardons. Twenty-three articles safeguarding the Catholic faith of the Infanta and the children were subscribed and sworn to by James and Charles.³⁰ The negotiations might have ended here had not Charles in a rash spirit of adventure gone to Madrid to sue in person for the hand of the Infanta. The Spanish minister, Olivarez, who had been eager for more favorable terms, saw his advantage in this unexpected turn of events. The dispensation was granted but at the request of Olivarez it had been accompanied by two sets

²⁸ The story of both the Spanish and the French match, which is given here in synoptic form, is told in intimate detail by Lingard, *History of England*, VII, 237-276.

²⁹ Cf. Pastor, *Geschichte der Päpste*, XII, 453-454; Gardiner, *History of England*, II, 255-256.

³⁰ The twenty-three articles may be found in Rushworth, *Historical Collections*, I, 86-88. The twentieth article granted the Infanta the custody of the children to the age of ten. Pope Gregory XV corrected this to the age of twelve for the girls and fourteen for the boys.

of instructions to the nuncio, Massimi,—one to be made public, and the other to be given only to the Spanish minister. By the first the nuncio was forbidden to part with the dispensation except upon Charles' promise of conversion and the repeal of the penal laws. By the other the nuncio was ordered to procure for the British Catholics every possible indulgence but to deliver the dispensation to the King of Spain whenever it should be required. Olivarez was thus given the opportunity to reopen discussions. The result was a public and private treaty. By the first it was stipulated that the marriage was to be celebrated in Spain and that the children should remain in the care of the mother to the age of ten. The private treaty stipulated that none of the penal laws should be executed, and that the king should strive to have them repealed. Catholic worship was to be tolerated in private houses and there must be no attempt to seduce the Infanta from her religion. King James and the Lords of the Council swore to the observance of the public treaty; the king privately, but before four witnesses, to the secret treaty.

91. A new cause of delay came with the death of Pope Gregory XV. Since his dispensation had not been executed, it was deemed necessary to procure another from his successor, Urban VIII. A new treaty was concluded and a second dispensation granted, but further threatened delays exhausted the patience of Charles who returned to England, and there the Spanish treaty was declared at an end.

92. But James would have an alliance and he now turned to France to begin negotiations for the marriage of Charles with Henrietta Maria, the sister of Louis XIII. Both the Pope and Philip of Spain made several attempts to dissuade Louis from consenting to the union, but Louis finally yielded to the suggestions of his mother who saw in the marriage a political advantage for France. An agreement was again drawn up which stipulated that the marriage take place in France; that on the arrival of the princess in England the contract should be publicly ratified without any religious ceremony; that she and her servants should be allowed the free exercise of their religion as fully as had been stipulated for the Infanta, and that the children should remain under her care to the age of thirteen.

93. Cardinal Richelieu observed, however, that it would be an affront to his sovereign if less were conceded in favor of a French than had been granted to a Spanish princess. He asked that every indulgence promised to English Catholics in the treaty at Madrid would likewise be secured in the treaty with the French king. To James and Charles this difficulty seemed insurmountable for after the Spanish negotiations both had given a sworn promise to Parliament that they would never permit in any treaty whatsoever the insertion of any clause granting indulgence or toleration to the English Catholics. A compromise was effected upon the stipulation of a secret engagement whereby the English king promised to grant his Catholic subjects a greater freedom than they would have enjoyed by virtue of the Spanish treaty.²⁸

94. On December 30, 1624, Pope Urban VIII granted the dispensation,²⁹ but forbade the nuncio, Spada, to deliver it unless some better security would be offered in favor of the English Catholics. The dispensation was finally executed upon an oath taken by Louis XIII by which he bound himself and his successors to employ the power of France in compelling the fulfillment of the treaty should this be necessary.

95. It is well to note that for at least a century and a half the mixed marriage dispensations of the Holy See were given only for the marriages of the Catholic nobility.³⁰ Since

²⁸ The conditions of the final treaty may be found in Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 218.

²⁹ "... Idque ob maximas, et gravissimas causas universae Christianae Rei-publicae bonum, et Catholicae fidei propagationem concernentes notas exponere Nobis propterea, etc. Idcirco Nos, etc. licet probe teneamus, Catholicorum cum Haereticis Matrimonia omnino fugienda esse, et quantum in Nobis est a Catholica Ecclesia procul arcere intendamus. Tamen cum grande verae fidei, et animarum plurimarum bonum speretur: negotium prius accuratissime examinatum cum pluribus gravibus viris, ac Doctrina, et prudentia praestantibus Venerabilibus Fratribus Nostris Sanctae Romanae Ecclesiae Cardinalibus mandavimus, qui post longam rei consultationem, videri sibi huiusmodi Matrimonium permittendum Nobis retulerunt . . ."—Albitius, *op. cit.*, Cap. XXXVI, n. 217.

³⁰ See No. 79, note 6. Other examples of such dispensations or their refusal, may be found in Albitius, *De Inconstantia in Fide*, Cap. XXXVI, nn. 209-213; Mazzei, *De Matr. personarum div. Relig.*, cap. II, § XIV; Feije, *De Matr. Mixtis*, p. 11-14; Giovine, *De Dispens. Matr.*, Tom. I, § CLXXII, n. 1; Binterim, *Denkwürdigkeiten*, VII, II, p. 49; Schulte, *Handb. des kath. Eherechts*, p. 251-252. Feije (*op. cit.*, p. 12) cites an instance of where Pope Clement XI on June 25, 1706 refused a Catholic noble (Comes de Hohenlohe) a dispensation from the impediment of Disparity of Cult.

both a *causa publica* and formal *cautiones* always existed for such dispensations, both came to be demanded as a necessary condition for every mixed marriage dispensation.²¹ There were no dispensations, therefore, for mixed marriages among the common people of Catholic countries, for in such cases the *causa publica* was wanting.²² In countries where heresy existed with impunity, the very necessity of Papal dispensation, and therefore of formal causes and *cautiones* for the mixed marriages of the common people, was entirely disregarded. It may accordingly be said without serious hesitation that the *Stylus Curiae* of the Holy See in reference to dispensations for mixed marriages had its derivation in the formalities of religious-political treaties. Perhaps the *cautiones* as they are known today may be regarded as a survival of these first formal guarantees.

96. In the meantime, however, mixed marriages among the common people in the countries where heresy was rampant continued to grow in number. For lack of observance of the decree "*Tametsi*" many of these unions were invalid. It was a trying situation, and accordingly Pope Benedict XIV declared that marriages between Protestants, and mixed marriages contracted in the United Provinces of Belgium were no longer to be subject for validity to the Tridentine form required by the decree "*Tametsi*".²³ Similar declarations were extended to other regions by later Pontiffs.²⁴

²¹ Cf. Benedictus XIV (ep. encycl. *Magnae Nobis*, 29 Jun. 1748, § 5.—*Fontes*, n. 387; Pius VII, rescript. ad ep. et vicar. capit. Galliar., 17 Feb. 1809,—Migne, *Theol. Curs. Complet.*, XXV, 710; S. C. de Prop. F., instr. (ad Vic. Ap. Sveciae), 6 Sept. 1785,—*Coll.*, n. 579.

²² "Quae autem causa sit sufficiens, ut Pontifex dispenset ad huiusmodi matrimonia contrahenda: Ego nunquam vidi concessas fuisse similes dispensationes, nisi suadente causa boni publici."—Albitius, *op. cit.*, Cap. XVIII, n. 46.

²³ Const. *Matrimonia*, 4 Nov. 1741,—*Coll.*, n. 333. A *dubium* had already been proposed on August 23, 1681 to the following effect: "*An in Provinciis Belgii confoederatis valeant matrimonia Catholicorum cum Heterodoxis contracta coram magistratu haeretico, non obstante decreto Concilii de solemnitatibus matrimonii in illis Provinciis publicato, et recepto*. Sac. Congreg. Concilii respondit: *Secretario cum Sanctissimo ad mentem*, quae erat, quod si respondendum esset ad *dubium*, dicendum esset matrimonia non valere; attamen animadversum fuit id non expedire, quia potius deberent permitti in eorum bona fide permanere quam tot periculis exponere Catholicos."—Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, n. 24. Vide etiam S. C. Conc., 13 Feb. 1683,—*ibid.*

²⁴ Pius VI, 19 Jun. 1793,—Migne, *Theol. Curs. Complet.*, XXV, 681; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830, *Fontes*, n. 480. Cf.

97. But slowly, and with patience, the Holy See began to gather the loose ends of straying customs to fashion one discipline that would apply everywhere and for all mixed marriages. Pope Benedict XIV condemned the practice of those who sought dispensations from the Holy See without mentioning that one of the parties was a heretic.⁵⁶ He would not, however, inaugurate too drastic a reform of a sudden lest dire consequences follow in its wake. The Holy See had indeed reserved to itself the exclusive right to dispense from the impediment of Mixed Religion,⁵⁷ yet where this right had been disregarded the abuse was to be corrected gradually. A certain dissimulation could even be tolerated as long as there was no danger of violating the divine and natural law.⁵⁸

Schulte, *Handb. des kath. Eherechts*, p. 271. With regard to the extension of the law in the United States see Conc. Plen. Balt. III (1884), p. CV-CIX. The marriages of Catholics with schismatics were also valid, even though they were contracted before a non-Catholic minister. Cf. S. C. de Prop. F., 21 Mart. 1759,—*Coll.*, n. 415; 18 Feb. 1783,—*Coll.*, n. 562; S. C. S. Off., 5 Aug. 1846,—*Coll.*, n. 1009; 10 Feb. 1892,—*Fontes*, n. 1150. The reason whereby a Catholic who was bound to the observance of the Tridentine form could clandestinely marry a heretic or schismatic, rested on the principle that those who were exempt (heretics and schismatics) communicated the exemption to those who were not.—“*propter individuitatem contractus*.” Cf. *Litterae Clementis XIII ad Archiep. Mechlinien.*, 15 Maii 1767,—Migne, *op. cit.* XXV, 684; Benedictus XIV, *De Synodo Dioec.*, Lib. VI, cap. VI, n. 12. As far as the requirements of the form were concerned the same principle applied to the marriages of the baptized with the unbaptized since they were not bound to observe the form. Cf. S. C. S. Off., instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 2,—*Fontes*, n. 866; Gasparri, *De Matr.*, n. 710; Chelodi, *Ius Matr.*, n. 81.

⁵⁶ Ep. encycl. *Magnae Nobis*, 29 Jun. 1748,—*Fontes*, n. 387; *De Synodo Dioec.*, Lib. VI, cap. V, n. 2; Lib. IX, cap. III, nn. 1-3.

⁵⁷ S. C. Conc., 22 Jun. 1624,—Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, n. 8; 6 Mart. 1694,—*ibid.* Both decrees are quoted in No. 80, note 11.

⁵⁸ Pope Pius VI seems to have tolerated the same practice for he quotes the passage from Pope Benedict XIV with approval: “*Quamvis tamen nequam velimus Tibi et Coepiscopis tuis vel in minimo adaugere angustias. neque criticas istas sequelas, quas credunt merito a se timeri, super illos attrahere; et ideo quantum ad id, quod punctum spectat simplicis permissionis seu veniae dandae, dicemus idem quod in responsoriis suis de 12 Sept. 1750 Episcopo Wratislaviensi dixit praenominatus Benedictus XIV scilicet: ‘non posse se positivo actu approbare, ut dispensationes concedantur inter haereticos, vel ipsos inter et catholicos, sed tamen se posse hoc dissimulare’; additque: ‘scientia haec nostra et tolerantia sufficere debet ad tuam assecurandam conscientiam, quandoquidem in materia, de qua agitur, non occurrat oppositio cum iure divino aut naturali, sed tantummodo cum iure ecclesiastico’.*”—*rescript. ad Card. Archiep. Mechlinien.*, 13 Iul. 1782, n. 2,—*Fontes*, n. 471.

98. In Belgium the civil law had enacted the forced assistance of pastors at mixed marriages. The Cardinal Archbishop of Mechlin wished, therefore, to know whether the assistance of the pastors could be permitted.²⁸ The answer given by Pope Pius VI represents a step in reform through an insistence upon the observance of formal *cautiones*.

99. If the Catholic party could not be dissuaded from his purpose, and the proposed mixed marriage was certain to take place, the pastor might be present as a material or informal witness ("*poterit tunc parochus catholicus MATERIALEM SUAM EXHIBERE PRAESENTIAM*") but only on the following conditions. There was to be no publication of the banns; the marriage was not to be celebrated *in loco sacro*; no liturgical prayers, rites, or vestments could be used, and on no pretext could the nuptial blessing be given. Furthermore, the heretic must give a formal declaration in writing, sealed with an oath and signed conjointly with two witnesses that the Catholic be left the free exercise of the Catholic religion, and that all the children, regardless of sex, be educated in the Catholic faith. The Catholic was likewise to give a sworn, written, and witnessed declaration foreswearing all apostasy, promising to educate all the children in the Catholic faith, and to employ effective means to procure the conversion of the non-Catholic spouse.²⁹

²⁸ It is interesting to note that the question did not turn upon the necessity of dispensation, but rather upon the liceity of the pastor's assistance.

²⁹ ". . . poterit tunc parochus catholicus *materialem suam exhibere praesentiam*, sic tamen, ut sequentes observare teneatur cautelas. *Primo*, ut non assistat tali matrimonio in loco sacro, nec aliqua veste ritum sacrum praeferente indutus, neque recitabit super contrahentes preces aliquas ecclesiasticas, et nullo modo ipsis benedicet. *Secundo*, ut exigit et recipiat a contrahente haeretico *declarationem in scriptis*, qua cum *iuramento*, praesentibus duobus testibus, qui debebunt et ipsi subscribere, *obliget se ad permittendum compartii usum liberum religionis catholicae et ad educandum in eadem omnes liberos nascituros sine ulla sexus distinctione* . . . *Tertio*, ut et ipse contrahens catholicus *declarationem* edat a se et duobus testibus subscriptam, in qua cum *iuramento* promittat, non tantum se nunquam apostaturum a religione sua catholica, sed educaturum in ipsa omne prolem nascituram, et procuraturum se efficaciter conversionem alterius contrahentis acatholici. *Quarto*, quod attinet *proclamationes*, decreto Caesareo imperatas, quas Episcopi apprehendunt actus esse civiles potius quam sacros, respondemus; quum praeeordinatae illae sint ad futuram celebrationem matrimonii, et ex consequenti positivam eidem co-operationem contineant, quod utique excedit simplicis tolerantiae limites, non posse nos, ut hae fiant, annuere . . ."—rescript. ad Card. Archiep. Mechlinien., 13 Iul. 1782, n. 4,—*Fontes*, n. 471.

100. The answer of Pope Pius VI involves a striking combination of formality and informality. There is an insistence upon written, sworn, and witnessed declarations and stipulations,—a prescription as formal as possible without an actual abjuration, in conjunction with the utter informality of a pastor's material presence, and the absence of even a suggestion as to the necessity of dispensation.

101. At first sight such a union of two opposites may appear somewhat strange, yet it is easily understood if the origin of the Roman *Stylus Curiae* be kept in mind. In fact it is what one might expect in the process of a gradual reform which would impose upon the laxities of practice some of the formalities of a discipline born of state treaties. The observance of the entire *stylus* implying the strict necessity of Papal dispensation might not at first be insisted upon,—the reform would begin rather with a definite provision for the safeguarding of the divine law; it would begin with an insistence upon a partial observance of a *stylus* which of its nature was formal. It is not surprising, therefore, to find much of this formality in the *cautiones* demanded for mixed marriages among the common people for which, up to that time, no *Stylus Curiae* as yet existed. Thereafter such *cautiones* were strictly insisted upon for all mixed and disparate marriages.⁴⁰ While they were indeed

⁴⁰ Cf. Pius VII, litt. (ad Vic. Treviren.), 23 Apr. 1817,—Gasparri, *De Matr.*, n. 490; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; instr., 27 Mart. 1830,—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 724; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, § 1.—*Fontes*, n. 484; allocut. *Officii memores*, 5 Jul. 1839.—*Fontes*, n. 492; ep. *Dolorem*, 30 Nov. 1839, n. 2.—*Fontes*, n. 493; litt. ap. *Quas vestro*, 30 Apr. 1841, nn. 2-3.—*Fontes*, n. 497; instr. (ad Archiep. et Ep. Austriacae ditionis), 22 Maii 1841,—Ballerini-Palmieri, *op. cit.*, Tract. X, Sect. VIII, n. 724; ep. 25 Iun. 1845,—*ibid.*, n. 720; ep. *Non sine gravi*, 23 Maii 1846, n. 1.—*Fontes*, n. 503; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; litt. Secret. Stat. (ad Archiep. Strigonien.), 7 Jul. 1890.—*NRT*, XXIII (1891), 387-388; Card. Rampolla, litt. (ad Card. Simor), 26 Sept. 1890.—*NRT*, XXIII (1891), 388-391; S. C. S. Off. (Quebec), 10 Sept. 1820.—*Fontes*, n. 859; instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5.—*Fontes*, n. 866; 20 Dec. 1837.—*ASS*, XXVI (1893-1894), 512; 30 Iun. 1842.—*Fontes*, n. 890; 15 Mart. 1854.—*LQS*, XLVI (1893), 21-22; (Helvetiae), 21 Ian. 1863.—*Fontes*, n. 973; (ad Ep. Osnabrugen.), 17 Feb. 1864.—*Fontes*, n. 976; (ad Archiep. Corcyren.), 3 Ian. 1871, nn. 3, 6-7.—*Fontes*, n. 1013; litt. (S. Germani), 17 Feb. 1875.—*Fontes*, n. 1039; (ad Ep. Aurelianen.), 6 Iun. 1879.—*Fontes*, n. 1064; litt. (ad Card. Simor), 21 Jul. 1880.—*NRT*, XIX (1887), 4-9; 12 Mart. 1881.—*NRT*, XV (1883), 121-122;

relieved of some of their formality^a they would have to be given in a form of a promise "*quae in pactum deducta praebeat morale fundamentum de veritate executionis, ita ut prudenter eiusmodi executio expectari possit.*"^a Nor would the Church dispense from them^a for they were founded on the divine law,^a and were necessary to safeguard it.

102. In France, where the Revolution had broken down the last barriers that had existed between Catholic and heretical communities, mixed marriages became a matter of frequent occurrence. The French Bishops presented an urgent request to Pope Pius VII asking for the faculty to dispense for mixed marriages. Apparently, the faculty had never before been ex-

instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888,—*Fontes*, n. 1112; 10 Dec. 1902,—*Fontes*, n. 1262; 21 Jun. 1912,—*AAS*, IV (1912), 442-443.

^a "The Bishops of the First Plenary Council of Baltimore (*Acta et Decreta*, p. 53) determined to petition the Holy See to substitute a solemn promise of the Catholic party for the oath. On three occasions the Holy See demanded it. Cf. S. C. S. Off., instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5.—*Fontes* n. 866; litt. (S. Germani), 17 Feb. 1875.—*Fontes*, n. 1039; (ad Ep. Aurelianen.), 6 Jun. 1879.—*Fontes*, n. 1064. Those who were occult Catholics were also to give the *cautiones* under oath. Cf. S. C. S. Off., instr. (ad Archiep. Scopian.), 15 Nov. 1882.—*Fontes*, n. 1074. It was generally admitted by the authors before the Code, however, than an oath of the Catholic party was not required. Cf. Bangen, *De Spons. et Matr.*, Tit. IV, p. 16; Wernz, *Ius Decret.*, IV, n. 587, not. 32; Gasparri, *De Matr.*, n. 499. In a letter of the Holy Office of Feb. 17, 1875 (*Fontes*, n. 1039) it was declared that the oath of the non-Catholic party was not always necessary. See also rescript. Poenitentiariae, 17 Jan. 1836.—Roskovány, *De Matr. Mixtis*, III, p. 156, not.* Its prescription was, however repeated in a later decree. Cf. S. C. S. Off. (ad Ep. Aurelianen.), 6 Jun. 1879.—*Fontes*, n. 1064. "Et quidem hoc altimum [iuramentum] tunc erit necessarium, ubi religionis gubernium eiusmodi reversales non attendit, vel ubi nupturientes in locum acatholicum se transferunt, in quo promissionis impletio difficillima futura est."—Aichner, *Compend. Juris Eccles.*, § 183.

^a S. C. S. Off., 30 Jun. 1842, ad 5,—*Fontes*, n. 890.

^a Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; Card. Rampolla, litt. (ad Card. Simor), 26 Sept. 1890,—*NRT*, XXIII (1891), 388-391.

^a Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482; Gregorius XVI, litt. 25 Jun. 1845,—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X. Sect. VIII, n. 720; S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Jan. 1871, nn. 6-7,—*Fontes*, n. 1013; litt. (ad Card. Simor), 21 Jul. 1880,—*NRT*, XIX (1887), 4-9; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 6.—*Fontes*, n. 1112; litt. Secret. Stat. (ad Archiep. Strigonien.), 7 Jul. 1890,—*NRT*, XXIII (1891), 387-388; S. C. de Prop. F., 25 Mart. 1858,—*NRT*, XV (1883), 582; litt. encycl., 11 Mart. 1868,—*Coll.*, n. 1324.

tended to Bishops,—at least not in Europe,* and the Pope was altogether unwilling to grant it.* He would not, however, disregard the gravity of the conditions that had arisen, so he had the question submitted to a group of theologians and Cardinals. Their decision would be transmitted to the French Bishops soon and all would receive the same formulary of faculties.*

103. It appears, therefore, that Bishops were given the faculty to dispense from the impediment of Mixed Religion only towards the close of the eighteenth or the beginning of the nineteenth century.* The Church seemed to be hesitant in

* "Episcopis vero, licet instantissime postulantibus eandem licentiam dare, in Europa praesertim, nunquam concessit . . ."—Pius VII., rescript ad ep. et vicar. capit. Galliar., 17 Feb. 1809.—Migne, *Theol. Curs. Complet.*, XXV, 710. Mergentheim is of the opinion, however, that the Bishops of Germany enjoyed the faculty at a very early date. "Der Erzbischof Ferdinand von Köln [1612-1650] frug bei dem römischen Stuhle an, wie er sich angesichts der jetzt so häufig vorkommenden Mischehen verhalten solle, und ferner, wie 'auch in allen anderen Ehehindernissen, und in welchen Graden der Anverwandtschaft er ohne Gewissensverletzung und Missbrauch der oberhirtlichen Gewalt am sichersten zu dispensieren hätte'. Er erwartete auf diese Anfrage eine päpstliche Belehrung. Statt der gewünschten Instruktion bekam er aber unter dem erwähnten Datum vom Papste ein 'ungebetenes und ganz unerwartetes' Indult worin ihm von der Kurie die Vollmacht erteilt wurde, auf sieben Jahre auctoritate Apostolica tanquam Sedis Apostolicae delegatus bis zum zweiten Grade zu dispensieren."—*Die Quinquennalfakultäten pro Foro Externo*, I, 51. The indult given by Pope Paul V on December 23, 1619 (the complete text may be found in Mergentheim, *op. cit.*, II, 256-257) contains, however, no explicit reference to marriages between Catholics and heretics, and it does not, therefore, appear entirely obvious that the faculty to dispense from the impediment of Mixed Religion or from impediments of relationship existing between Catholics and heretics was granted or implied. Yet Mergentheim (*op. cit.*, II, 118-119) writes: "In einer der Streitschriften lesen wir dass eine Korrespondenz über die impedimenta mixtae religionis und consanguinitatis et affinitatis die Veranlassung der ersten Quinquennalendelegation gewesen sei [here he refers to the paragraph already quoted above]. Dass es sich hier nur um eine 'Belehrung' gehandelt habe, ist undenkbar. Hätte der Erzbischof wirklich die Ehe dispensbefugnisse iure proprio in Anspruch genommen, so wäre, war die Anfrage, 'wie er in allen anderen Ehehindernissen (ausser dem impedimentum mixtae religionis), und in welchen Graden der Anverwandtschaft er ohne Gewissensverletzung und ohne Missbrauch seiner oberhirtlichen Gewalt am sichersten zu dispensieren hätte', ein Ding der Unmöglichkeit."

* "Quare si a nobis petitioni huic respondendum nunc esset, responsum certe nostrum a constanti huius Sanctae Sedis regula et praedecessorum nostrorum exemplo agendique ratione dissidere non posset."—*rescript. cit.*

* *Ibid.*

* See No. 102 note 45; Feije, *De Matr. Mixtis*, p. 220; *De Imped. et Dispens.*, n. 613. Yet Pope Benedict XIV seems to suggest that Bishops in his time did occasionally possess the faculty: "Tales enim re ipsa concurrere possunt circumstantiae, quae cum ab eo, qui facultatem dispensandi habet, expressae fuerint, aditum aperiunt concessioni legitimae dispensationis, cuius vi

granting the faculty,—perhaps with a fear of a return to old abuses." Whenever it was delegated thereafter its exercise was confined to a limited time or to a specified number of cases."

104. But all this time the disregard of the necessity of Papal dispensation for mixed marriages among the common

matrimonium inter partes, haereticam unam, alteramque Catholicam, licitum reddatur, ut alibi demonstrabimus."—*De Synodo Dioec.*, Lib. VI, cap. V, n. 4. Vide etiam *ibid.*, Lib. IX, cap. III, n. 2. Cf. Scherer, *Handb. des Kirchenrechtes*, II, p. 422, not. 74; Bangen, *De Spons. et Matr.*, Tit. II, p. 160-161; Wernz, *Ius Decret.*, IV, nn. 576, 584; A&KR, XIV (1865), 324 for a confirmation of the opinion accepted as the more probable in the present study. The Bishops of the United States enjoyed the faculty at least in the second half of the nineteenth century. "In haereticorum cum catholicis nuptiis etiam nostrates [Episcopi] ex eadem speciali venia dispensant, conditionibus tamen appositis . . ."—Kenrick, *Theol. Mor.*, II, Tract. XXI, n. 217. Cf. Conc. Plen. Balt. II (1866), n. 339; Vermeersch, *De Form. Facult. S. C. de Prop. F.*, n. 26; *Facult. Extr.*, Form. D, art. 3, 4.—Konings-Putzer, *Comment. in Facult.*, p. 388-389.

* In 1888 Pope Leo XIII, through the Holy Office, conferred on the *Ordinarii locorum* the power to dispense from public diriment impediments ("excepto sacro Presbyteratus ordine, et affinitate lineae rectae ex copula licita proveniente") those joined in civil marriage or living in concubinage, who, being in danger of death, wished to contract a valid marriage to obtain peace of conscience. Cf. S. C. S. Off., litt. encycl. 20 Feb. 1888,—*Fontes*, n. 1109; O'Keeffe, *Matrimonial Dispensations*, p. 47-49. While the faculty thus included the impediment of Disparity of Cult, it did not include that of the impediment of Mixed Religion. Cf. S. C. S. Off. (Leopoldien.), 18 Mart. 1891,—*Fontes*, n. 1132; 12 Apr. 1899,—*Fontes*, n. 1219.

** Cf. Rescript. Poenitentiariae, 19 Ian. 1836.—Roskonávy, *De Matr. Mixtis*, III, p. 156, not.*; Wernz, *Ius Decret.*, IV, n. 584, not. 28. Further stipulations existed to keep the exercise of this faculty within well defined limits. Already in the sixteenth century, Pope Clement VIII (*Cum sicut*, 26 Jul. 1596,—*Bullarium Diplomatum et Privilegiorum Sanctorum Romanorum Pontificum Taurinensis Editio*, [Augustae Taurinorum, 1865], X, 279-280) had forbidden the Italians to go to regions where Catholic worship was not held, and especially prohibited them from marrying heretics. The Inquisition could proceed against them, if they disregarded this prohibition, as *contra suspectos de haeresi*.—Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 238, quoad 2um dub. When, therefore, the faculty of dispensing from the impediment of Mixed Religion was granted to Bishops it carried the exception: "*exceptis Italis, de quibus non constat Italicum domicilium deseruisse.*" Cf. S. C. de Prop. F., 30 Aug. 1865.—*ASS*, II (1866), 672. Later the exception was removed. Cf. S. C. S. Off., 4 Maii 1887,—*NRT*, XX (1888), 37; 17 Iun. 1891,—*LQS*, XLIV (1891), 976. The limitation of the faculty regarding its exercise within the boundaries of the diocese, was abrogated in 1896. Cf. S. C. S. Off., 6 Iul. 1896.—*Coll.*, n. 1945. Other limitations existed to the effect that dispensations could be given only to the subjects of the one employing the faculty (S. C. S. Off., 14 Dec. 1882,—*Coll.*, n. 1583) and that the faculty to dispense from the impediment of Disparity of Cult did not comprehend the marriages of Catholics with Jews. Cf. *Facult. Extr.*, Form. D, art. 3.—Konings-Putzer, *op. cit.*, p. 379.

people continued in countries where heresy was rampant.⁸¹ It was time that such laxity be corrected and the fact was emphasized that a dispensation was always to be sought from the Holy See,⁸²—that the Church, though she had been silent with regard to the conditions existing in those countries in order to avoid greater evils,⁸³ had never by her silence approved of the abuses that under the plea of a contrary custom had derogated from her law.⁸⁴

105. The final reform in discipline came, therefore, only with the insistence upon the observance of the entire *Stylus Curiae*, which, as we have seen, had its origin in the formalities of religious-political treaties. The *stylus* was subject also to a modification in this final step in reform. Formerly only the *causa publica* had been admitted since dispensations had been given only to members of the Catholic nobility. Now, with

⁸¹ The laxity in Germany continued well into the nineteenth century. Cf. Scherer, *Handb. des Kirchenrechtes*, II, p. 409-410; Hergenröther, P., *Lehrb. des kath. Kirchenrechts*, p. 729, not. 2; Wernz, *Ius Decret.*, IV, n. 576; Leitner, *Lehrb. des kath. Ehrechts*, p. 235; Hilling, *Das Ehrecht des C. I. C.*, p. 54.

⁸² Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, §§ 2, 6.—*Fontes*, n. 484; ep. *Dolorem*, 30 Nov. 1839, n. 2.—*Fontes*, n. 493; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 3.—*Fontes*, n. 497; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858.—*Coll.*, n. 1169; S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Ian. 1871, nn. 3-4.—*Fontes*, n. 1013. Cf. Giovine, *De Dispens. Matr.*, Tom. I, § CLXXI, nn. 2-4; Scherer, *op. cit.*, II, p. 413, not. 30.

⁸³ “. . . Tolerat quidem in aliquibus locis Apostolica Sedes matrimonia inter Catholicum, et Haeticam, vel Haeticum, et Catholicam, cum nequeat impedire; et ecclesiastica quadam prudentia, ne maiora mala enascantur, dissimulat, ac tacet.”—Benedictus XIV, ep. *Ad tuas*, 8 Aug. 1748, § 6.—*Fontes*, n. 389. Cf. Pius VI, rescript. (ad Ep. Rosnavien.), 20 Aug. 1780.—Feije, *De Matr. Mixtis*, p. 178-179.

⁸⁴ “Et licet in quibusdam regionibus propter locorum et temporum difficultatem eadem connubia [catholicorum cum haeticis] tolerari contingat, id quidem ad eam referendum est aequanimitatem, quae nulla ratione approbationis et consensus cuiuspiam loco habenda sit, sed merae patientiae, quam ad maiora vitanda mala offert necessitas, non voluntas. . . .”—Pius VII, breve ad Archiep. Moguntin., 8 Oct. 1803, n. 5.—*Fontes*, n. 477. “Quamobrem etsi iamdiu, uti affirmas, opinio isthic inoleverit, licite posse mixtas iniri nuptias absque Sancate Sedis dispensatione, haec tamen opinio, qualibet non obstante consuetudine, tolerari nequit.”—S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Ian. 1871.—*Fontes*, n. 1013. Cf. Pius VII, rescript. (ad Vic. Treviren.), 25 Apr. 1817.—Feije, *De Matr. Mixtis*, p. 179; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, § 1.—*Fontes*, n. 484; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 1.—*Fontes*, n. 497; Petra, *Comment. ad Const. Apost.*, Tom. IV, Const. XII, Ioannis XXII, nn. 13-15.

the insistence on the requirement of dispensation for mixed marriages among the common people, the *causa publica* was replaced by the *causa gravis*.¹⁰⁶

106. The formal *cautiones* which had been the first wedge of reform now came to be so intimately connected with the necessity of dispensation and the existence of a grave cause that the three elements were to be regarded as inseparable in the reformed discipline.¹⁰⁷ The absence of a grave cause would render the dispensation invalid. No dispensation would be granted unless the *cautiones* were given. Rather than dispense in the absence of the *cautiones*, the Church continued to tolerate the practice that existed in certain sections of Germany and Austria¹⁰⁸ of permitting the passive assistance of a pastor at mixed marriages,¹⁰⁹ i. e., the pastor was to act merely as a qualified or authorized witness ("*testis qualificatus seu auctorizabilis*") without asking the consent of the parties.¹¹⁰

¹⁰⁶ See No. 104, note 52; S. C. de Prop. F., litt. encycl., 11 Mart. 1868, —*Coll.*, n. 1324.

¹⁰⁷ See No. 244, note 65.

¹⁰⁸ Cf. Schönsteiner, *Grundriss des kirchl. Eherechts*, p. 35. This forced toleration could be invoked only for those regions where it was permitted by the Holy See. Cf. Feije, *De Imped. et Dispens.*, n. 570; Wernz, *Ius Decret.*, IV, n. 589, not. 53; S. C. S. Off., 21 Jan. 1912,—AAS, IV (1912), 443-444.

¹⁰⁹ Pius VI, instr. 19 Jan. 1793,—Migne, *Theol. Curs. Complet.*, XXV, 681-682; Pius VII, litt. (ad Vic. Treviren.), 23 Apr. 1817.—Gasparri, *De Matr.*, n. 490; Pius VIII litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482; instr. ad Archiep. Colonien. et ad Ep. Treviren. Paderbornen. et Monasterien., 27 Mart. 1830,—Schulte, *Handb. des kath. Eherechts*, p. 259-262; Gregorius XVI, instr. ad Archiep. et Ep. Bavariae, 12 Sept. 1834.—*NRT*, XV (1883), 512-513; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 6.—*Fontes*, n. 497. This tolerance often became necessary because of civil prescriptions forcing a pastor to assist at such marriages under threat of civil penalties. Cf. Gasparri, *De Matr.*, n. 490; Feije, *De Imped. et Dispens.*, p. 446, not. 3. Again soldiers, especially officers, were at times prohibited under threat of severe penalties to give the *cautiones*. Cf. S. C. S. Off., 10 Dec. 1902,—*Fontes*, n. 1262. In two decrees which apparently had reference only to particular regions, the Holy Office demanded that priests assist only passively at the marriages of Catholics with those who had left the Church, or who had joined condemned societies. Cf. S. C. S. Off. (Leodien.), 30 Jan. 1867,—*Fontes*, n. 998; instr. (ad Ordinarios Imperii Brasil.), 2 Jul. 1878,—*Fontes*, n. 1056. The toleration of passive assistance was never extended to the United States. Cf. Wernz, *Ius Decret.*, IV, n. 589, not. 55. For an enumeration of the places where it was tolerated for mixed marriages see Schönsteiner, *op. cit.*, p. 80-81; Prümmer, *Manuale Iuris Can.*, Q. 334, Schol., not. 1.

¹¹⁰ The term "passive assistance" is here employed in its strict sense, namely, "*audito consensu*." Among the authors and even in instructions of the

107. In her further concern that by dispensing she would in no way appear to approve such marriages, the Church prohibited all liturgical rites at their celebration, and only to avoid greater evils would she permit their limited use." That the faithful might not be scandalized she began to forbid the publication of the banns, permitting it only for reasons of necessity and on the condition that the religion of the non-Catholic be not mentioned." On this point, however, it does not appear that there was always a uniformity of discipline."

Holy See the term is often used in a much broader sense, i. e., in the sense of forbidding any active cooperation by use of liturgical rites or the publication of the banns. Cf. Hergenröther, P., *Lehrb. des kath. Kirchenrechts*, p. 733; Feije, *De Imped. et Dispens.*, n. 571; Wernz, *Ius Decret.*, IV, n. 588, not. 43. The distinction should, however, be born in mind since the broad sense of the term referred also to those marriages that were contracted with a dispensation. See the following note.

¹⁰⁰ Pius VI rescript. ad Card. Archiep. Mechlinien., 13 Jul. 1782, n. 4.—*Fontes*, n. 471; instr. 19 Jun. 1793.—Migne, *Theol. Curs. Complet.*, XXV, 681; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; Gregorius XVI, instr. ad Ep. et Archiep. Bavariae, 12 Sept. 1834.—*NRT*, XV (1883), 512-513; allocut. *Officii memores*, 5 Jul. 1839.—*Fontes*, n. 492; litt. ap. *Quas vestro*, 30 Apr. 1841, nn. 5-6.—*Fontes*, n. 497; ep. *Non sine gravi*, 23 Maii 1846, n. 2.—*Fontes*, n. 503; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858.—*Coll.*, n. 1169; S. C. S. Off., 1 Aug. 1821.—*Fontes*, n. 863; instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5.—*Fontes*, n. 866; 26 Nov. 1835.—*Fontes*, n. 873; instr. (ad Ep. S. Alberti), 9 Dec. 1847.—*Coll.*, n. 1427; (Vic. Ap. Sandwic.), 11 Dec. 1850, ad 22.—*Fontes*, n. 913; litt. (ad Vic. Ap. Myssuriem.), 26 Nov. 1862.—*Fontes*, n. 971; instr. (ad Archiep. Corcyren.), 3 Ian. 1871.—*Fontes*, n. 1013; 17 Ian. 1872.—*Fontes*, n. 1020; 17 Ian. 1877.—*NRT*, XX (1888), 462-464; (Rosen), 16 Jul. 1885.—*Fontes*, n. 1094; 29 Nov. 1899.—*Fontes*, n. 1230; S. C. de Prop. F., instr. (ad Vic. Ap. Sveciae), 6 Sept. 1785.—*Coll.*, n. 579; ep. 4 Dec. 1862.—De Smet, *De Spons. et Matr.*, p. 446, not. 1; litt. encycl., 11 Mart. 1868.—*Coll.*, n. 1324.

¹⁰¹ Pius VI, rescript. ad Card. Archiep. Mechlinien., 13 Jul. 1782, n. 4.—*Fontes*, n. 471; instr. 19 Jun. 1793.—Migne, *Theol. Curs. Complet.*, XXV, 681; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, §§ 2, 7.—*Fontes*, n. 484; S. C. S. Off., litt. (ad Vic. Ap. Myssuriem.), 26 Nov. 1862.—*Fontes*, n. 971.

¹⁰² Their publication was apparently taken for granted in the Apostolic letter of Pope Pius VIII (*Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482): "Quae quidem salubria monita erunt etiam, prout prudentia suggererit, iteranda, eo praesertim tempore, quo nuptiarum dies instare videatur, dumque consuetis proclamationibus disquiritur, utrum alia sint, quae illis obstant, impedimenta canonica." In the previous centuries there appears to have been no universal prohibition to their publication. In a seventeenth century petition to the Holy See seeking a dispensation from the impediment of consanguinity existing between a Catholic and a heretic, it is explicitly stated that the impediment was discovered through the proclamation of the banns. Cf. Corradus, *Praxis Dispens.*, Lib. VII, cap. II, n. 99.

108. In the United States of America the discipline regarding the publication of the banns was, as a matter of fact, marked by many uncertainties. The Sixth Provincial Council of Baltimore held in 1846 decreed that the banns should be published in accordance with the provisions of the Councils of the Lateran and Trent.⁶⁶ On July 3, 1847 Cardinal Fransonius, the Prefect of the Congregation of the Propaganda, wrote to Archbishop Eccleston commending especially the decree on the banns, and added: "*Quapropter, cum haberi debeat, nulla ratio satis firma videtur obesse, quominus proclamationes, etiam quando agitur de matrimoniis mixtis fiant, quae tamen matrimonia nullo adhibito religioso ritu celebrari oportet.*"⁶⁷ In view of this letter the first synod of the diocese of Milwaukee held in 1847,⁶⁸ and a diocesan synod held at St. Louis in 1850⁶⁹ decreed that the banns should be published also for mixed marriages. A diocesan synod of Baltimore in 1853⁷⁰ and the First Synod of the Diocese of Richmond in 1856⁷¹ seemed to suppose the necessity of their publication when they extended faculties to the priests of their jurisdiction to dispense from all three publications in the case of mixed marriages.⁷² Yet a diocesan synod of Baltimore held in 1857 issued the following decree:⁷³ "*Mixtis matrimoniis banna non sunt praemittenda iuxta constantem Ecclesiae Romanae disciplinam; quod enim in quadam S. Congregationis responsione ad concilii provincialis Baltimorensis VI decreta insinuatum est errore scribae contingit, prout certiores nos fecit dum Romae versamur anno 1854 Illmus Secretarius S. Congregationis, qui nunc Praefecti munere fungitur.*"

⁶⁶ Decretum n. IV.

⁶⁷ Conc. Balt. Prov. VI (1846), p. 26-27.

⁶⁸ N. 15. The constitutions of this synod were not published until 1853.

⁶⁹ Decretum n. XVII. A synod of the diocese of St. Louis held in 1839 had decreed that the banns should not be published for mixed marriages. Cf. Feije, *De Matr. Mixtis*, p. 236.

⁷⁰ Decretum n. XIV.

⁷¹ Decretum n. LXI.

⁷² The statutes of the diocese of Pittsburgh compiled from synods held in 1844, 1846 and 1854 (cf. cap. VI, n. 11) demanded that the banns be published for all marriages.

⁷³ Decretum n. V.

109. On the other hand, the Baltimore Ritual of 1866 (note on page 189 of this ritual) read: "*ut fiant proclamationes etiam quando agitur de matrimoniis mixtis.*"⁷¹ The Archbishop of Oregon having received a reply from Cardinal Antonelli (28 Feb. 1874) that ten years before (May 11, 1864) had been given to the Bishop of Natchez,⁷² wished to know further how the note in the Baltimore Ritual was to be reconciled with the letter of Cardinal Fransonius to Archbishop Essleston. Cardinal Franchi replied on September 28, 1874 that the note in the Ritual had been affixed without the knowledge of the Congregation; that it was to be rejected on a double score, namely, inasmuch as it implied an absolute precept to publish the banns, and (apparently) because the urgent conditions that would render the publication necessary and, therefore, reasonable, did not exist everywhere and in every case. The banns for mixed marriages were to be published only when it was deemed necessary and opportune by the Ordinary.⁷³ In the meantime a Roman Ritual published in 1873 by John Murphy of Baltimore directed: "*In ineundis istius modi, Ecclesia ea generatim omittenda indixit, per quae Catholicorum matrimonia decorantur, inclusis etiam promlationibus*" (p. 544, not.*).

110. On the 4th of July 1874 the Bishop of Nesqually (Seattle) received a reply from the Holy Office⁷⁴ to the same effect as that sent to the Bishop of Natchez, with the added explanation that if the publications were not made, which in certain circumstances and on the prudent judgment of the Bishop might be advisable to avoid the danger of scandal, the free state of the parties should be determined in accordance with the norms laid down by Pope Clement X in the instruction of August 21, 1670.⁷⁵

⁷¹ The reference and the quotation is found in a letter of Cardinal Franchi to the Archbishop of Oregon. Cf. Konings, *Theol. Mor.*, Vol. II, p. 395.

⁷² "... posse fieri proclamationes in mixtis nuptiis, quae Ap[osto]lica dispensatione contrahuntur, suppressa tamen mentione religionis contrahentium."—Konings, *loc. cit.*

⁷³ Konings, *Theol. Mor.*, Vol. II, p. 395.

⁷⁴ *Fontes*, n. 1031. A Latin translation is found in Gasparri, *De Matr.*, I, p. 497, not. 1-2.

⁷⁵ *Fontes*, n. 742.

111. At the beginning of the following year (January 30, 1875) the Archbishop of Baltimore received a letter from Cardinal Franchi: ". . . certum est S. Sedem hisce postremis temporibus declarasse fieri proclamationes in mixtis nuptiis, quæ Apostolica dispensatione contrahuntur."⁷⁶ Eleven years later (1886) the Fifth diocesan Synod of Natchez, citing the reply of May 11, 1864,⁷⁷ decreed that the banns should be published also for mixed marriages.⁷⁸ Ten synods of other dioceses ruled, however, that they were not to be published.⁷⁹

112. With the decree "*Ne Temere*"⁸⁰ a uniformity of discipline with regard to the form of marriage was again established.⁸¹ Though it did not bind baptized or unbaptized non-Catholics when contracting among themselves,⁸² it did bind all Catholics when marrying baptized or unbaptized non-Catholics, even after obtaining a dispensation from the impediment of Mixed Religion or Disparity of Cult,—except in those regions for which the Holy See had provided otherwise.⁸³ Practically, it implied the necessity of dispensation even for the validity of mixed marriages since a priest was forbidden to witness such marriages unless a dispensation had been granted,

⁷⁶ Konings, *loc. cit.*

⁷⁷ See No. 109, note 72.

⁷⁸ Decretum n. XLI.

⁷⁹ Synodus Dioecæana Bostoniensis (1868), n. 121; (1886), n. 139, footnote; Ludovicopolitana IV (1874), cap. VIII, n. VI; Novarcensis III (1878), n. 82, c; Omahanensis I (1887), n. 98; Sancate Fidei I (1888), § 8, n. 4; Dubuquensis II (1902), n. 103; Davenportensis II (1904), n. 101; Sioupolitana II (1909), n. 117, f; Kansanopolitana II (1912), n. 133.

⁸⁰ The text of the decree may be found in many canonical textbooks,—among them the following treatise: Wouters, *Comment. in Decret. "Ne Temere"*, p. 5-9.

⁸¹ The decree was promulgated August 2, 1907 and took effect Easter Sunday, April 19, 1908.

⁸² Art. XI, § 3. Article III of the apostolic letter "*Provida*" (*Fontes*, n. 670) had gone further and granted a *sanatio in radice* to all marriages of heretics or schismatics contracted among themselves, and to mixed marriages between a Catholic and a heretic or schismatic, which had been contracted in violation of the form prescribed by the decree "*Tametsi*."

⁸³ Art. XI, § 2 of the decree "*Ne Temere*." "*Sequitur igitur, non valere principium antea satis communiter admissum: Pars immunis communicat cum altera parte suam immunitatem; atque pro eo substitutum esse contrarium: Pars ligata communicat cum altera parte suum ligamen.*"—Wouters, *Comment. in Decret. "Ne Temere"*, p. 79.

—except in those regions where passive assistance was apparently still tolerated.¹² To a great extent these regions were governed by the prescriptions of the apostolic letter "*Provida*" which existed as an exception to the decree "*Ne Temere*".

113. The apostolic letter "*Provida*"¹³ which had taken effect on Easter Sunday, April 5, 1906, and which had established a uniform discipline for Germany¹⁴ regarding the form of marriage was (together with the continued tolerance of passive assistance in certain regions) the only exception in the Latin Church that retained its force after the decree "*Ne Temere*".¹⁵ Both the decree "*Ne Temere*" and the apostolic letter "*Provida*" remained in force up to the time of the Code.

¹² Cf. S. C. S. Off., 21 Jan. 1912.—AAS, IV (1912), 443-444; 5 Aug. 1916.—AAS, VIII (1916), 316.

¹³ Pius X, litt. ap., 18 Jan. 1906.—*Fontes*, n. 670.

¹⁴ While, indeed, the "*Declaratio Benedictina*" had been extended to parts of Germany, and though passive assistance was tolerated in certain localities, these two regulations of the form of marriage were, of course, in no way identical in nature. A certain confusion, moreover, existed regarding the places actually governed by the Tridentine rule of the "*Tametsi*." The purpose of the apostolic letter "*Provida*" was, therefore, to establish a uniformity of discipline for Germany. It did not, however, extend to Germany's foreign possessions.

¹⁵ Cf. S. C. Conc., 25 Jan. 1907, ad IV.—ASS, XLI (1908), 108 sq. While the apostolic letter "*Provida*" emphasized the prohibition to the marriages of Catholics with heretics and schismatics, such marriages were not to be subject thereafter to the Tridentine law for validity. Only those who were born in Germany came under the exception. Cf. S. C. Conc., 28 Mart. 1908, ad III.—ASS, XLI (1908), 288. On February 23, 1909 the same discipline was extended also to Hungary, where it was likewise restricted to those born in Hungary. Moreover, those born in Germany could not use this privilege in Hungary, nor, *viceversa*, those born in Hungary marrying in Germany; nor could one born in Germany marry clandestinely another born in Hungary,—in either Germany or Hungary. Cf. S. C. de Sacram., 18 Jan. 1909, ad I, II, III.—AAS, I (1909), 516-517.

PART III

PRESENT LEGISLATION IN THE CODE

CHAPTER VII

FUNDAMENTAL ELEMENTS IN THE LAW OF THE CHURCH

ART. I. RELATION OF THE ECCLESIASTICAL TO THE DIVINE AND NATURAL LAW

114. From an historical study of the discipline regarding mixed and disparate marriages, a gradual development in the Church's legislation becomes apparent. While the Scriptural warnings of the Apostles apparently implied a general presumption of danger to the Faith attendant upon the association of the faithful with unbelievers, the Church gave this presumption a more specific determination by directing its attention especially to the *marriages* of the faithful with unbelievers.¹ If her members were to marry pagans, Jews, or heretics, they might do so only on the condition of the conversion of such unbelievers. For centuries, this condition represented the Church's practical safeguard; the baptism and conversion of the pagan or Jew, and the abjuration of heresy by the heretic. When finally the Church began to issue dispensations it was again only on the condition that she have the assurance of the absence of a proximate danger to the Faith through the *prima facie* evidence of formal promises demanded especially of the non-Catholic providing for the freedom of the Catholic party's profession of the Catholic Faith, and for the Catholic education of the children. This safeguard of reserving to herself

¹ Augustine expresses the relation of the impediments of Mixed Religion and Disparity of Cult to the divine law in the following manner: "Impediments of the divine-natural law are . . . also disparity of worship and mixed religion in cases where the faith of the Catholic party is in danger. However, since this is rather an ethico-dogmatical consequence of the impediment, we should say that both these impediments of disparity and mixed religion belong directly (*in directo*) to the impediments of ecclesiastical law, but indirectly (*in obliquo*) to the impediments of divine law."—*The Pastor*, p. 130.

the judgment of the absence of danger to the Faith is a fundamental element in the law of the Church with regard to mixed and disparate marriages. She does not permit an interested individual to judge for himself, but reserves this decision to herself.³

ART. II. THE "*Communicatio in Sacris*"

115. But in addition to this measure of safety, which has its more immediate foundation in the implied presumptions of the divine and natural law, the Church has reasons of her own for prohibiting mixed and disparate marriages. From the very beginning she has had a vital consciousness of the mysteries of grace that were left in her custody to dispense. Thus she permitted the presence of the catechumens only at the preparatory part of the Mass lest by their presence or participation in the Sacrifice itself they profane its sacredness. In like manner catechumens, heretics, and the excommunicated, were excluded from the reception of the sacraments. Their participation represented a communion in sacred things that the Church could not tolerate. While this element of a "*communicatio in sacris*" does not appear to have been urged as a formal part of the prohibition to the marriages of the faithful with unbelievers, yet it was hinted at.⁴ The more complete development in the Middle Ages of the theology of the sacraments but re-emphasized the traditional discipline of the Church regarding a "*communicatio in sacris*" with those outside of the Church. When, therefore, the Holy See in later centuries repeated the constant prohibition of the Church to mixed marriages it emphasized the disgraceful communion in sacred things ("*flagitiosa in rebus sacris communio*").⁴ Since a valid marriage between baptized

³ "Leges latae ad praecavendum periculum generale, urgent etiamsi in casu particulari periculum non adsit."—CIC, canon 21.

⁴ See No. 3, note 3; No. 36, note 24; No. 53, note 20.

⁴ Gregorius XVI, ep. encycl. *Commissum divinitus*, 17 Maii 1835, § 4.—*Fontes*, n. 490; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 1.—*Fontes*, n. 497; Leo XIII, ep. encycl. *Arcanum*, 10 Feb. 1880, n. 26.—*Fontes*, n. 580; S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 2.—*Fontes*, n. 1112; instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858, n. 2.—*Coll.*, n. 1169; instr. S. C. de Prop. F., a. 1858 (ad Ep. Graeco Rumenes).—*Coll.*, n. 1154; litt. encycl. 11 Mart. 1868.—*Coll.*, n. 1324. Vide etiam Conc. Plen. Balt. III (1884), n. 130; Feije, *De Matr. Mixtis*, p. 175-176.

persons is at the same time a sacramental bond.⁶ and since the parties themselves are the ministers of the sacrament, the "*communicatio in sacris*" becomes apparent.⁷

116. The general term "*communicatio in sacris*" includes those communions which are forbidden to Catholics both by the divine and natural law, and by the law of the Church. A "*communicatio in sacris*" may be *active* or *passive*. It is *active* where there is formal participation in religious service; it is *passive* where there is mere material assistance or physical presence. The communion, whether active or passive, may be regarded from two viewpoints, namely; the assistance of a Catholic at non-Catholic rites, or the assistance of a non-Catholic at Catholic rites.⁸

117. A Catholic is never permitted to assist actively at non-Catholic services for such a communion would involve a denial of the Catholic Faith by at least an implicit profession for a false religion.⁹ The prohibition is one of the divine and

⁶ See No. 403.

⁷ The "*communicatio in sacris*" is much more apparent in mixed than in disparate marriages since in a disparate marriage at least the unbaptized party cannot receive the sacrament. If the opinion be accepted that the baptized party to a disparate marriage receives the sacrament, the "*communicatio in sacris*" involved would rest on the fact that the sacrament is received from the unbaptized party. The opinion that neither party to a disparate marriage receives the sacrament is sponsored, however, by far the greater majority of modern canonists and theologians. See *infra* No. 400, note 2. Since the Church has not formally decided the question, the element of a "*communicatio in sacris*" cannot be attributed (*per se*) as a primary factor in her legislation on disparate marriages. There are reasons sufficient for establishing a prohibition and even a diriment impediment to such marriages without invoking doubtful matter.

⁸ The phrase "*in sacris*" when applied to religious rites outside of the Catholic Church is used in a broad sense. These rites often involve flagrant errors against Faith, or, as is the case among pagans, gross superstitions. The phrase "*in sacris*" in such instances refers rather to the rite itself than to any intrinsic character of sacredness.

⁹ Noldin (*Theol. Mor.*, II, n. 34) gives to *active* communion the meaning: "*quando nos aliorum sacris participamus*," and to *passive*: "*quando infideles vel haereticos in nostris sacris permittimus*." He then distinguishes both active and passive communion into *formal* and *material*. While the distinction thus becomes well defined, it is less confusing to retain the one distinction of *active* and *passive* as it is understood in canon 1258 of the Code. While this canon refers explicitly only to the communion of Catholics in non-Catholic rites, the same distinction of *active* and *passive* may readily be applied to the assistance of non-Catholics at Catholic services.

¹⁰ Noldin, *Theol. Mor.*, II, n. 38. Cf. canon 1258, § 1.

natural law.¹⁰ Moreover, the participation of non-Catholics at Catholic services which would involve an acknowledgment of religious unity is likewise forbidden by the natural and divine law. A passive communion of this kind, however, which would imply no acknowledgment of religious unity does not appear to be under divine prohibition. A mixed marriage represents this latter type of "*communicatio in sacris*". If the non-Catholic party complies with the requisite conditions demanded by the Church in dispensing from the impediment, he really renounces the rights he would claim as a non-Catholic and implicitly acknowledges the right of the Catholic Church.¹¹ Yet the Church abhors this communion between a Catholic and a non-Catholic in the ministration and reception of the sacrament of matrimony. It is an element of the Church's prohibition to mixed marriages which is her own,—apart from the prohibition of the natural and divine law.¹²

ART. III. PROFANATION OF THE SACRAMENT

118. Parallel to, and intimately connected with, the prohibition of a "*communicatio in sacris*" is the element of the unworthy reception of the sacrament by the baptized non-Catholic. Since the sacraments are intrinsically sacred and holy, a certain worthiness is required on the part of those who receive them,—especially with regard to the sacraments of the living. In the mind of the Church there is a profanation of the sacrament of matrimony when it is administered by a Catholic to one who is not united to the external communion of the

¹⁰ Cf. Pontius, *De Sacram. Matr.*, Append., cap. II, n. 8; Jeunin, *Comment. de Sacram.*, Dissert. X, Q. VII, cap. VII, art. 3; Ferre, *De Virtutibus Theol.*, Tom. I, Tract. II, Q. IX, pr. For grave reasons a material assistance may at times be permitted, though this question has but an indirect bearing on the present discussion. Decisions that deal with the various phases of the "*communicatio in sacris*" may be found in Blat, *Comment.*, Vol. III, P. III, n. 125.

¹¹ Cf. Noldin, *op. cit.*, II, n. 37; Vlaming, *Prael. Iuris Matr.*, n. 214.

¹² Cf. Giovine, *De Dispens. Matr.*, Tom. I, § CLXX, n. 7; Carriere, *Prael. Theol.*, Tom. II, n. 756; Feije, *De Imped. et Dispens.*, n. 567; Blieck, *Theol. Univ.*, Vol. IV, p. 329; Blat, *Comment.*, Vol. III, P. I, n. 458; Vermeersch-Creusen, *Epitome*, II, n. 330; Leitner, *Lehrb. des kath. Eherechts*, p. 238; De Smet, *De Spons. et Matr.*, p. 440, not. 3; Gasparri, *De Matr.*, n. 487.

Church."¹² The Popes have repeatedly spoken of such marriages as sacrilegious.¹³

ART. IV. THE ULTIMATE FOUNDATIONS OF THE IMPEDIMENTS OF MIXED RELIGION AND DISPARITY OF CULT

119. The elements discussed so far do not, however, give an ultimate explanation of the law of the Church on the impediments in question. Danger to the Faith does not, of itself, account for the fact that Disparity of Cult is a diriment impediment, while Mixed Religion is but prohibitive. If danger to the Faith were a sufficient explanation of the discipline as it has existed for centuries, on what score in the law before the Code were the marriages of baptized non-Catholics with the unbaptized invalid? Why should the marriage of a bap-

¹² Only a grave cause and the dispensation of the Church will save the Catholic from committing a sin by this profanation. That it may be suffered at times and without sin to the party ministering the sacrament to the unworthy is deduced from the practice of the Church and the common teaching of the authors. The principal arguments may be summed up as follows: a) It would be temerarious to say that because of the profanation involved the Church can never dispense and thereby at least implicitly permit the marriage to take place, for *de facto* the Church has given thousands of such dispensations. b) No theologian now seriously contends that a person in the state of grace (and who without a special revelation, can say absolutely that he is?) may never contract a marriage with one who is in the state of sin. Yet in this case there is a profanation just as there is in the ministration of the sacrament of matrimony by a Catholic to a heretic or schismatic. c) It is an admitted principle that one may seek the cooperation of another and with him posit an act good in itself or indifferent. For a grave reason, and in the present case with the dispensation of the Church, this may be done even though an evil effect follows accidentally which is contrary to the intention of the agent. d) With few exceptions a minister of a sacrament sins mortally if he is ordained and deputed for the purpose of administering the sacraments, and in this capacity solemnly confers a sacrament while in the state of mortal sin. The ministers of the sacrament of matrimony, however, are the contracting parties themselves acting not as public ministers of the Church, whose duty it is by virtue of their office to safeguard and administer the sacraments, but as private ministers entering a sacramental contract, and attending primarily to their own interests and advantage. Cf. De Lugo, *Tract. de Sacram. in genere*, Disp. VIII, nn. 225-229; Benedictus XIV, *De Synodo Dioec.*, Lib. IX, cap. III, n. 5; Carriere, *Prael. Theol.*, Tom. II, n. 756; Moser, *De Impedimentis Matrimonii*, cap. XIII, n. 10,—apud Migne, *Theol. Curs. Complet.*, XXV, 630; Scavini, *Theol. Mor.*, Lib. III, n. 727, not. 3; Cappello, *De Sacram.*, III, n. 37; Vlaming, *Prael. Iuris Matr.*, n. 215; Noldin, *Theol. Mor.*, III, nn. 32-33; Hyland, *Excommunication*, p. 99-100. *A fortiori*, after the Church has granted a dispensation the assistance of a priest and two witnesses becomes entirely lawful.

¹³ See No. 36, note 25.

tized Catholic with another professed Catholic, though actually unbaptized, be invalid? Why (*per se*) should the marriage of a baptized Catholic with a baptized, sworn enemy of the Church be valid?

§ I. MIXED RELIGION

120. If the elements of a "*communicatio in sacris*", and the profanation of the sacrament be taken conjointly with that of danger to the Faith, an adequate explanation still seems to be wanting why the Church on the basis of these three elements should not erect a formal prohibitive impediment to the marriages of Catholics with apostates and other baptized aliens to the Faith even if they are not enrolled in an heretical or schismatic sect.¹⁶ In the law of the Church, Mixed Religion is a prohibitive impediment to a marriage between two baptized persons, one of whom belongs to the Catholic Church and the other to an heretical or schismatic sect.¹⁷ Perhaps the restriction to formal membership in an heretical or schismatic sect may be explained on the ground that the limitation offers a more certain norm of determining the limits of the impediment.¹⁷ But why should not notorious apostates and those who are already recognized as heretics through a declaratory or condemnatory sentence be included even though they have not joined an heretical or schismatic sect? Other reasons must, therefore, be found that will give a more fundamental explanation of the actual limits of the impediment.

¹⁶ The "*communicatio in sacris*" is not so evident in cases where the non-Catholic party is not a member of a sect. The note of a profanation of the sacrament, however, remains. Cf. Leitner, *Lehrb. des kath. Eherechts*, p. 251.

¹⁷ Canon 1060.

¹⁷ This explanation seems to derive some confirmation from the fact that apparently no such limitation was clearly defined until the nineteenth century. But see Benedictus XIV, ep. encycl. *Magnae Nobis*, 29 Jun. 1748, § 1, —*Fontes*, n. 387. One of the very arguments used by some authors in demonstrating why heresy should not be a diriment impediment was the element of uncertainty in determining who was a heretic, since a person might secretly profess heresy or be confused in his beliefs. Cf. Estius, *In IV Lib. Sent. Comment.*, Dist. 39, § 4; Mazzei (who quotes the opinion of Semelier), *De Matr. personarum div. Relig.*, cap. II, § VII; Feije, *De Imped. et Dispens.*, n. 666; Wernz, *Ius Decret.*, IV, n. 503, not. 6. The need of a certain norm, however, does not seem to explain why the Church placed the limitation of the impediment as it exists today when on the basis of other well defined lines she might have included others.

121. In the first place, membership of one party in an heretical or schismatic sect seems to imply a greater presumption of danger to the faith of the Catholic. It is less common for an individual who has fallen away from the Faith, or who has been brought up outside of the Church in a non-sectarian belief, to seek to draw others to his particular form of worship or belief.¹⁹ But a sect of its nature, if it is to continue to exist, must make every effort to propagate itself. It is a demand of the very instinct of self-preservation. A member of a sect may be presumed to be identified, at least in some measure, with this aim. He has, moreover, the support of an organized society to secure this end. The greater constancy derived from a unity of purpose produces in an individual member of a sect a bias or prejudice against the truths of the Catholic faith that renders him less apt to respond to the efforts of a Catholic consort to convert him. The danger to the faith of the Catholic may, therefore, be justly presumed to be augmented by a union in marriage with a *sectarian* non-Catholic. Yet even this consideration does not seem to offer an adequate reason for the limits of the impediment.

122. The marriage of a Catholic (presumably in the state of grace) with a public sinner who refuses to be reconciled with the Church, or with a notorious apostate, or with a member of a condemned society, bears the mark of a deformity arising from an inequality or difference existing between the two parties. This deformity²⁰ is accentuated when it is based on the inequality existing between a Catholic and one who, in addition to a denial of the Faith, is also a member of an heretical or schismatic sect.²⁰

¹⁹ Cf. Wernz-Vidal, *Ius Canonicum*, V, 201.

²⁰ The Church has frequently referred to the deformity of mixed marriages as a reason for her abhorrence. Cf. Clemens XI, litt. (ad Gustavum Leopoldum), 23 Iulii 1707.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 718; Pius VII, rescript. (ad ep. et vicar. capit. Galliar.), 17 Feb. 1809.—Migne, *Theol. Curs. Complet.*, XXV, 710; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, § 1.—*Fontes*, n. 484; S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 2.—*Fontes*, n. 1112.

²⁰ Theoretically, a schismatic sect may exist without heretical belief,—practically, the taint of heresy always accompanies it. Cf. Pignatelli, *Const. Can.*, Tom. IV, consult. CXXXIX, n. 1; Augustine, *Commentary*, V, p. 145, note 25; S. C. de Prop. F., 18 Feb. 1783,—*Coll.*, n. 562. (This decree speaks of Photians and other heretics).

123. It is a truly grave sin for an individual to deny the Faith or to leave the Church in schism. But the breach of separation is further widened when it assumes a social or corporate resistance to the Church, when it represents an adherence to a sect whose sole reason for existence is based on an objectively false profession of faith or an avowed and organized hostility to the Church which Christ founded.²¹ Through the reception of Baptism, the sacrament of faith, a certain equality, however, exists between a Catholic and a sectarian non-Catholic, an equality which renders possible the contracting of a sacramental marriage, a *matrimonium ratum*. The inequality arises through the difference of a profession of faith, accentuated by a formal adherence to an heretical or schismatic sect. With reference, therefore, to the possibility of contracting a *matrimonium ratum*, the difference between a Catholic and a sectarian non-Catholic is *modal*. Because of the grave difference that does exist, the Church has established an impediment to such a union; inasmuch as the difference is *modal* the impediment is prohibitive instead of diriment. The ultimate foundation seems to be the *modal difference of a profession of faith* as it exists in its most pronounced form between a Catholic and a *sectarian* non-Catholic.

§ II. DISPARITY OF CULT

124. On the other hand, the diriment impediment of Disparity of Cult is founded on the inequality existing between the baptized and the unbaptized. In the teaching of the great scholastics the very possibility of a sacramental marriage is frustrated since a *matrimonium ratum* demands an equality through Baptism, the sacrament of Faith. Since the union of marriage between the baptized and the unbaptized cannot subsist "*ratione sacramenti*" the deformity consists in this very frustration of the sacramental bond that Christ established and intended the baptized to enter.²² The difference between

²¹ Cf. Wernz, *Ius Decret.*, IV, n. 580.

²² This teaching of the scholastics was accepted by the later authors. Cf. Bellarminus, Lib. 1 *De Sacram. Matr.*, cap. XXIII.—*Op. Omnia*, Tom. V, 120; Perez, *De S. Matr. Sacram.*, Disp. XXXVI, Sect. II, n. 2; Reiffenstuel, *Jus Can. Univ.*, Lib. IV, Tit. I, n. 358; Astesani de Asta, *Summa*, Lib. VII,

the baptized and the unbaptized is more than modal, it is *radical*, based on the inequality arising from the reception and non-reception of Baptism, the sacrament of Faith. On the ground of this existing difference the Church has accepted an impediment (even though the custom that established it seems to have contemplated rather the element of danger to the Faith) and inasmuch as this difference is *radical* she has made of it a *diriment* impediment. The ultimate foundation, therefore, of the diriment impediment of Disparity of Cult appears to be the *radical difference* existing between the baptized and the unbaptized.

125. All these elements,—the danger to the Faith, the "*communicatio in sacris*", the profanation of the sacrament, the modal and radical differences, are represented in the discipline of the Church as it is expressed in its crystalized form in the Code.²⁵

Tit. XV, art. 1; Pirhing, *Jus Can.*, Tom. IV, Tit. I, Sect. VI, n. 164; Dandino, *De Suspectis de Haeresi*, cap. III, Sect. I, Subsect. I, § IV, n. 4; De Justis, *De Dispens. Matr.*, Lib. II, cap. XV, nn. 2-3; De Coninck, *De Sacram.*, Tom. II, Disp. 31, n. 43; Mazzei, *De Matr. personarum div. Relig.*, cap. I, § 1; Leurenus, *Jus Can. Univ.*, Lib. IV, quaest. 116. A few appear to have overemphasized the element of danger to the Faith in accounting for the dirimency of the impediment. Cf. Soto, *Comment. in IV Sent.*, Tom. II, Dist. 39, Q 1, art. 2; Pappaini, *De Sacram.*, Tract. VII, cap. IV, § 53.

²⁵ The element of scandal has not received a formal discussion for, though it enters into the disciplinary enactments of the Church, it is rather consequent upon the existence of the divine and ecclesiastical law that refers more immediately to the impediments themselves.

CHAPTER VIII

THE PROHIBITIVE IMPEDIMENT OF MIXED RELIGION

CANON 1060

Severissime Ecclesia ubique prohibet ne matrimonium ineatur inter duas personas baptizatas, quarum altera sit catholica, altera vero sectae haereticae seu schismaticaе adscripta; quod si adsit perversionis periculum coniugis catholici et prolis, coniugium ipsa etiam lege divina vetatur.

126. The clause "*severissime Ecclesia ubique prohibet*" represents a concise summary of the constant discipline of the Church regarding mixed marriages. Even a casual study of the history of the impediment will leave no doubt as to the Church's attitude to marriages of her children with those who are members of non-Catholic sects. By the term "*ubique*" the canon enacts a precaution lest there be a revival of any teaching that might be similar to the once widespread opinion that a contrary custom in certain countries had abrogated the necessity of dispensation for mixed marriages among the common people.¹

127. The basis of the impediment and its prohibitive nature ("*Ecclesia PROHIBET*") totally distinguish it from the diriment impediment of Disparity of Cult. In order that the impediment of Mixed Religion exist in contradistinction to that of Disparity of Cult, both persons must be validly bap-

¹ Cf. Cappello, *De Sacram.*, III, n. 306. Chelodi (*Ius Matr.*, n. 58) remarks: *sane ad superabundantiam in C. apposita est particula 'ubique'.*" The precaution does not at all appear to be superfluous. A prohibitive impediment always faces the danger of being minimized or reduced to its least possible stringency when the pressing urgencies of periods and localities render its strict enforcement difficult. With the rising ascendancy of religious indifference in many regions it would require no far stretch of imagination to visualize a laxity contrary to both the spirit and the letter of the law.

tized. An essential condition to the existence of the impediment of Disparity of Cult is the non-baptism of one of the parties. Herein lies the radical difference that marks the basis of the impediment. In the impediment of Mixed Religion, however, valid Baptism marks the parity or likeness that exists between the parties ("*inter duas personas baptizatas*"). The modal difference rests fundamentally upon the difference of the profession of faith.

ART. I. THE TERM "CATHOLIC" IN CANON 1060

128. One of the parties must be a Catholic ("*quarum altera sit catholica*"). The term "Catholic" may be taken in a strict and in a broad sense. In the strict sense it connotes one who is by external profession an actual member of the Catholic Church. In a broad sense it designates not only those who are professed Catholics, but also those who at any time were members of the Catholic Church by Baptism or by conversion.³

129. In canon 1060 the term "Catholic" must be understood in the strict sense, i. e., as designating one who, at the time of the marriage, is an actual professed member of the Catholic Church.⁴ The following, therefore, are included in the strict sense of the term "Catholic"; a) those who have been baptized in, or converted to, the Catholic Church and who at the time of marriage are actual, professed Catholics; b) those Catholics who are occult heretics;⁴ c) those Catholics who are sus-

³ Cf. De Smet, *De Spons. et Matr.*, p. 114, not. 1.

⁴ Cf. De Smet, *op. cit.*, n. 500; Farrugia, *De Matr.*, n. 131; Blat, *Comment.*, Vol. III, P. I, n. 455; Cappello, *De Sacram.*, III, n. 306, c; Woywod, *A Practical Commentary*, I, n. 1039. In the term "Catholic" are included not only those who are members of the Latin Church, but also those who are members of the Uniate Eastern Churches. Cf. S. C. de Prop. F., 18 Feb. 1783,—*Coll.*, n. 562; instr. (ad Ep. Graeco-Rumenos), a. 1858,—*Coll.*, n. 1154; S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888,—*Fontes*, n. 1112; Duskie, *The Canonical Status of the Orientals in the United States*, p. 172; Cappello, *op. cit.*, III, nn. 898-900; Binders, *Handb. des kath. Eherechts*, p. 269. The phrase in canon 1060, "*ubique prohibet*", likewise seems to preclude the possibility of any exception for those of the Uniate Eastern Churches. It is more accurate, however, to say that the impediment of Mixed Religion binds them by reason of their own discipline which in this respect is fundamentally the same as in the Latin Church.

⁴ Since the impediment is *natura sua publicum*, the fact of the occult heresy cannot be urged in determining the allegiance to the Catholic Church in the external forum.

pected of heresy;⁵ d) those who have been excommunicated for moral delinquencies other than heresy or apostasy,⁶ and public sinners who refuse to be reconciled with the Church; e) those Catholics who are members of condemned societies.⁷ The term "Catholic" excludes: a) those who notoriously have left the Church as heretics or apostates;⁸ b) those who

⁵ Cf. canons 2316; 2319, § 2; 2320; 2340, § 1. In these canons suspects of heresy seem to be regarded as Catholics though they are under suspicion of heresy. By virtue of canon 2315, if, after six months, and after due warnings, the suspect of heresy does not remove the cause of suspicion or amend his ways, he is then regarded as a heretic and may be punished as such. "*Ideo nulla opus est sententia iudicis: ipso facto QUASI HAERETICUS, etsi forte haereticus non sit, incurrit excommunicationem.*"—Cipollini, *De Censuris*, Lib. II, n. 15. Whether he be a "quasi heretic" or a heretic in the full sense of the term, canon 2315 says: "*habeatur tanquam haereticus*," and it seems that a person so designated is not to be comprised in the term "Catholic" as it is used in canon 1060. If the provisions of canon 2315 are realized, the person becomes juridically a heretic. This seems to exclude him from the juridic term "Catholic" as it is used in canon 1060. Cf. Sole, *De Delictis et Poenis*, n. 320.

⁶ Canon 2340, § 1 must, however, be considered: "*Si quis, obdurato animo, per annum insorduerit in censura excommunicationis, est de haeresi suspectus.*" Blat (*Comment.*, V, n. 181) in explaining why such an individual becomes a suspect of heresy, says: "*... est suspectus de haeresi, qua erret circa necessitatem communionis ecclesiasticae ad salutem consequendam.*" See the preceding note and Augustine, *Commentary*, VIII, p. 362; Hyland, *Excommunication*, p. 167.

⁷ See No. 129, notes 5 & 6; No. 131, note 15; Nos. 139-140, 142-147.

⁸ Eichmann (*Kath. Mischehenrecht nach dem C. I. C.*, p. 11) includes in the term "Catholic" those who have been baptized in the Catholic Church and have left the Church without joining a non-Catholic sect. In a sense, everyone who has ever been a member of the Catholic Church is a Catholic and remains bound by the laws of the Church. But by virtue of canon 1325, § 2, one who leaves the Church seems to be designated more accurately as a heretic, apostate, or schismatic,—at least he does not appear to be comprised in the term "Catholic" of canon 1060. If a heretic who was once a Catholic is to be regarded as a Catholic then Eichmann's opinion would stand. Yet the terms "heretic" and "Catholic" are apparently mutually exclusive of each other in canon 1060. An important difference exists between the concept of a Catholic who remains bound by the laws of the Church as long as he lives, and a Catholic who is an actual, professed member of the Church in the sense of canon 1060. The objection that by this interpretation the Catholic who became a heretic or an apostate would be granted a favor since the impediment would not bind him, might be urged with equal force in the case of a Catholic joining a non-Catholic sect. This is placing no premium on heresy or apostasy. Such a heretic or apostate remains bound to the prescriptions of canon 1099, § 1, n. 1 and, practically speaking, he could not enter a valid marriage with another ascribed to a sect unless he renounced his heresy or apostasy. A priest would not be permitted to assist at his marriage. Yet the term "Catholic" in canon 1060 is not to be confused with the broader sense of the term in canon 1099, § 1, n. 1. Cf. De Smet, *De Spons. et Matr.*, nn. 140, 500; Leitner, *Lehrb. des kath. Eherechts*, p. 217. One of the reasons for the impediment of Mixed Religion is the presumption of danger to the faith of the Catholic

by a declaratory or condemnatory sentence are recognized as heretics or apostates; c) those Catholics who have joined an heretical or schismatic sect or a false religion.

ART. II. "*Altero vero sectae haereticae seu schismaticaе adscripta*"

130. On the other hand the non-Catholic party to the marriage must be a member of an heretical or schismatic sect or of a false religion. "A sect may be described as a group of Christians who, banded together, refuse to accept the supreme authority of the Catholic Church. They constitute merely a religious party under human unauthorized leadership, or a sect. Hence, the term 'sect' connotes a group of individual heretics or schismatics morally united by a common bond of belief or purpose."⁹

131. The Code does not explicitly include the term "false religion" which former decisions were wont to use.¹⁰ Is the term left out with design or is it implied in the term "heretical or schismatic sect"? If the interpretation be accepted that only strictly heretical or schismatic sects are implied, it would force the rather grotesque conclusion that a Catholic wishing to marry a baptized person who had become an adherent of the religion of the Jews or Mohammedans,¹¹ would not need a dispensation from the impediment of Mixed Religion. In the light of canon 6, nn. 2, 4,¹² it is quite legitimate

party. The presumption loses most of its force when it regards one who has renounced the Faith, or is guilty of heresy, apostasy, or schism. Cf. De Smet, *loc. cit.*; Mazella, Camillus, *De Religione et Ecclesia*, ed. 4., Romae, 1892, n. 600; Billot, L., *Tractatus de Ecclesia Christi*, ed. 3., Prati, 1909, p. 291; Tanquary, *Theol. Dogm.*, I, n. 903.

⁹ The quotation marks about the word "sect" do not appear in the quotation cited,—they have been inserted for clarity.

¹⁰ Kearney, *Sponsors at Baptism*, p. 83-84.

¹¹ Cf. S. C. S. Off. (Leodien.), 30 Jan. 1867,—*Fontes*, n. 998; (in statutis synodalibus pro dioecesi Ostiensi), a. 1886,—Gasparri, *De Matr.*, n. 485. The juxtaposition of the term "false religion" to the term "sect" apparently indicates an organized religious body.

¹² Binders (*Handb. des kath. Eherechts*, p. 269) regards such baptized adherents as apostates. The term "apostate", however, is not used in canon 1060.

¹³ Canon 6, n. 2—"Canones qui ius vetus ex integro referunt, ex veteris iuris auctoritate, atque ideo ex receptis apud probatos auctores interpretationibus, sunt aestimandi; n. 4—In dubio num aliquod canonum praescriptum cum veteri iure discrepet, a veteri iure non est recedendum."

to extend the meaning of "*sectae haereticæ*" to include the "false religion" of older decrees. Admittedly, the strict sense of the term "heretical sect" would prohibit this usage.¹⁴ An heretical or schismatic sect does not, however, include a condemned society.¹⁵

To avoid confusion and cumbersome expressions, the terms "sectarian non-Catholics" and "non-Catholic sects" are to be understood in the present study as including a false religion. The term "sect" has been applied by the Church also to Judaism and Mohammedanism,¹⁶ though it usually connotes a Christian denomination.¹⁷

132. What is the precise meaning of "*altera vero sectae haereticæ seu schismaticæ adscripta*"? Does membership in a non-Catholic sect refer only to those who have once been Catholics? The Code in canon 1064, n. 1 demands of Ordinaries and pastors: "*Fideles a mixtis nuptiis, quantum possunt, absterreant.*" When canon 1065 prescribes that the faithful are also to be deterred from marriages with those who have rejected the Catholic faith, "*etsi ad sectam acatholicam non transierint*", it seems to supply by a prohibition what canon 1060 has not included in the impediment of Mixed Religion. But canon 1065 refers *explicitly* only to those who have once

¹⁴ Though the distinction between Judaism, Paganism, and Heresy is not rigidly fixed, it does appear, nevertheless, to exist. Cf. De Lugo, *Tract. de Virt. Fidei Div.*, Disp. XVIII, Sect. 3; Suarez, *Tract. I, De Fide Theol.*, Disp. XVI, Sect. IV; Bouquillon, *Inst. Theol. Mor. Spec.*, n. 218; Kenrick, *Theol. Mor.*, II, Tract. XIII, n. 41; Noldin, *Theol. Mor.*, III, nn. 26-27. "*Secta acatholica proprie non est nec iudaismus, nec paganismus . . .*"—Vermeersch-Creusen, *Epitome*, I, n. 625. See No. 174, note 61.

¹⁵ Cf. S. C. S. Off. (Portus Aloisii), 1 Aug. 1855,—*Fontes*, n. 932; (Marysville), 21 Aug. 1861,—*Fontes*, n. 967; (Leodien.) 30 Jan. 1867,—*Fontes*, n. 998; (S. Bonifacii), 23 Apr. 1873,—*Fontes*, n. 1026; instr. (ad Ordinarios Imperii Brasil.), 2 Jul. 1878,—*Fontes*, n. 1056; (Bombay), 21 Feb. 1883,—*Fontes*, n. 1079; 26 Nov. 1896,—*A&KR*, LXXVIII (1898), 523-524; 25 Maii 1897,—*A&KR*, LXXIX (1899), 741-742 (also in *Fontes*, n. 1186); Vermeersch-Creusen, *Epitome*, I, n. 625.

¹⁶ Cf. S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 1,—*Fontes*, n. 1112.

¹⁷ Cf. Kearney, *Sponsors at Baptism*, p. 83; *Catholic Encyclopedia*, art. "Sect and Sects", XIII, 674. Augustine's restriction (*Commentary*, V, p. 143) of the term "*sectae haereticæ seu schismaticæ*" to Christian denominations alone, appears to be too limited. In a broad sense the sects of the Socinians, Unitarians, and Mormons, might be called Christian, yet the designation may readily be challenged.

been Catholics." Again the Pontifical Commission for the Authentic Interpretation of the Code decided that the clause "*qui sectae acatholicae adhaeserunt*" of canon 542, n. 1 referred only to those who had left the Faith to join a non-Catholic sect." Does membership in a non-Catholic sect contemplated in canon 1060 likewise refer only to those Catholics who have joined such sects? The decree most frequently referred to by the authors¹² as forming the background of the clauses in question in canons 1060 and 1065, is one issued by the Holy Office on January 30, 1867. Again there is *explicit* reference only to those who have once been Catholics.¹³

133. The restriction of the clause "*altera vero sectae haereticae seu schismatica adscripta*" of canon 1060 to those who had formerly been Catholics does a manifest violence to the sense of the canon. It would thereby either exclude those who had been members of such sects from infancy, or it would include all non-Catholics (who had never been members of the Catholic Church), whether they were members of sects or not. Both hypotheses must be rejected. If those who are members of sects *by baptism* from infancy are to be excluded, a distinction is introduced that is not warranted by the wording of the canon. If all non-Catholics are to be included irrespective of membership in a sect, then the clause "*sectae haereticae seu schismatica adscripta*" becomes meaningless. Membership in a sect has no limited reference to those who have once been Catholics,

¹² Implicitly canon 1065 has reference also to all non-sectarian non-Catholics.

¹³ "Utrum verba *qui sectae acatholicae adhaeserunt* canonis 542 sint intelligenda de iis, qui Dei gratia moti ex haeresi vel schismate, in quibus nati sunt, ad Ecclesiam pervenerint; an potius de iis qui a fide defecerunt et sectae acatholicae adhaeserunt." *Resp.* "Negative ad primam partem, affirmative ad secundam."—Pont. Comm., 6 Oct. 1919, n. 7,—AAS, XI (1919), 477.

¹⁴ Cerato, *Matr.*, n. 54; Chelodi, *Ius Matr.*, p. 58 cum not. 2; Farrugia, *De Matr.*, n. 131; Wernz, *Ius Decret.*, IV, n. 574 cum not. 1; Wernz-Vidal, *Ius Canonicum*, V, n. 168 cum not. 1.

¹⁵ "Quoties agatur de matrimonio inter unam partem catholicam et alteram quae a fide ita defecit, ut alicui falsae religioni vel sectae sese adscripserit, requirendum esse consuetam et necessariam dispensationem cum solitis ac notis praescriptionibus et clausulis. Quod si agatur de matrimonio inter unam partem catholicam et alteram quae fidem abiicit, at nulli falsae religioni, vel haereticae sectae sese adscripsit, quando parochus nullo modo potest huiusmodi matrimonium impedire . . . rem deferendam esse ad R. P. D. Episcopum . . ."—*Fontes*, n. 998. Gasparri (*De Matr.*, n. 485) quotes a similar decree of the year 1886.

—it includes all who at the time of the marriage are such members.

134. Nor is it necessary to postulate novelty of the clause in canon 1060.²² The decree of January 30, 1867 concerns itself only with those who have once been Catholics because the question which it answered concerned itself only with those who had been Catholics. Implicitly the decree may readily suppose the necessity of sectarian membership of those who have always been non-Catholics.²³ The decision of the Pontifical Commission regards only canon 542, n. 1, wherein the clause "*qui sectae acatholicae adhaeserunt*" has not the same meaning or purpose as the clause "*altero vero sectae haereticae seu schismaticae [sit] adscripta*" of canon 1060. In like manner, Catholics wishing to marry non-sectarian non-Catholics are to be ruled by the prescriptions of canon 1065. All authors who have written since the Code agree that for the existence of the impediment of Mixed Religion it is necessary that one of the parties be truly a member ("*adscripta*") of a non-Catholic sect at the time of the marriage.²⁴

135. To an inquiry as to who were to be considered as heretics with reference to mixed marriages, the Holy Office replied that those described in the inquiry were to be designated as heretics. The classification given in the inquiry was as follows:²⁵

²² The necessity of membership in a sect was clearly stated by authors who wrote before the Code. Cf. D'Annibale, *Theol. Mor.*, III, p. 344, not. 3; Wernz, *Ius Decret.*, IV, n. 503, not. 6; n. 574. Pope Benedict XIV (ep. encycl. *Magnae Nobis*, 29 Jun. 1748, § 1.—*Fontes*, n. 387) likewise seems to suggest the necessity of membership in a sect.

²³ See No. 135, note 28.

²⁴ Cf. Cappello, *De Sacram.*, III, n. 306; Cerato, *Matr.*, n. 54; Chelodi, *Ius Matr.*, n. 58; Petrovits, *New Church Law on Matrimony*, n. 187; Wernz-Vidal, *Ius Canonicum*, V, n. 168 cum not. 1; De Smet, *De Spons. et Matr.*, n. 500; Eichmann, *Kath. Mischehenrecht nach dem C. I. C.*, p. 12; Leitner, *Lehrb. des kath. Eherechts*, p. 235; Blat, *Comment.*, Vol. III, P. I, n. 455; Vermeersch-Creusen, *Epitome*, II, n. 330; Ayrinhac, *Marriage Legislation*, p. 113-114; Augustine, *Commentary*, V, p. 143.

²⁵ S. C. S. Off., litt. (ad Ep. Harlemen.), 6 Apr. 1859,—*Fontes*, n. 950. Ayrinhac (*Marriage Legislation*, p. 114) considers all the classes enumerated as members of heretical sects, while Augustine (*Commentary*, V, p. 144) classes them simply as heretics and remarks: "However it must not be overlooked that our text says: '*sectae haereticae adscripta*', i. e., the non-Catholic party must be a member of an heretical sect, or at least must have adhered to a sect sometime previously to the marriage." With reference to

1). "*Illi qui catholice baptizati, a pueritia nondum septennali, inhaeresi educantur, ac haeresim profitentur.*" Those who have received Baptism in the Catholic Church but who from the age of infancy ("*a pueritia nondum septennali*") have been brought up in heresy and profess it, are regarded as having lost their character of being a Catholic. They are deemed to be members of the heretical sect ("*haeresi*") in which they have been educated and whose doctrines they still profess.

2). "*Qui non tam in haeresi, quam ab haereticis educantur, nulla scilicet, vel vix nulla haereticae doctrinae instructione accepta, et cultu non frequentato, licet aliquoties participato.*" Since there is no evident transition to a different or a larger class, it seems that those here under consideration are they who, though baptized as Catholics, have been brought up from infancy by heretics. Those in the preceding class had been educated *in heresy*. The question here turns rather on the fact of an education *by heretics* than in heresy. The mention of infrequent attendance at worship would again seem to imply the adherence of the children's tutors to an heretical sect for "*cultus*", as it is used here, connotes worship in an organized religion. Even if such children have little to do with the teaching or worship of the sect, they are regarded as belonging to the sect of their guardians.²⁵

3). "*Qui adhuc pueri in manus haereticorum incidentes, haereticae sectae adiunguntur.*" The case here considered is that

sectarian membership, it has already been shown (No. 133) that canon 1060 is concerned with membership in a sect *at the time of the marriage*,—not with a past adherence. Ayrinhac's opinion may well be sustained and the classification given in the decree serves as the most complete statement of the law before the Code. It is somewhat surprising that among the authors consulted, Ayrinhac and Augustine seem to be the only ones who refer to the decree in connection with canon 1060. While the answer was concerned primarily with the exception from the *form* of marriage, which exception has been partially abrogated by the Code, the implied affirmation as to the inclusiveness of the term "*heretics*" in *mixed marriages* does not appear to have undergone any change. Cf. Chelodi, *Ius Matr.*, n. 139. It is for this reason that an interpretation of the meaning of each clause is deemed helpful in connection with the present question.

²⁵ In the light of the two classifications already given the following statement of Petrovits (*New Church Law on Matrimony*, n. 187) may be questioned: "A Catholic child, even if he should be brought up by heretics from his very infancy, is not considered as a heretic, unless they enrolled his name on the official register of such a sect, or unless he worshipped in it even without such enrollment."

of children baptized as Catholics who, after the age of reason ("pueri"), have fallen into the hands of heretics. These are not regarded as following *ipso facto* the sect of their guardians; they must be positively affiliated with a sect before they are classed as members of an heretical sect.

4). "*Apostatae ab Ecclesia catholica ad haereticam sectam transeuntes.*" Those who after the age of reason leave the Catholic Faith must formally join a sect before they will be regarded as heretics in the question of mixed marriages. A mere favorable inclination toward a sect is not sufficient."

5). "*Qui nati et baptizati ab haereticis, adoleverunt quin ullam sollemnem haereseos professionem emisierint, ac veluti nullius religionis.*" Those born of heretics (members of an heretical sect) and baptized by them (in a sect) remain members of the sect of their parents even though they quite neglect their religious duties. They continue to remain as members of the sect until *by a positive act* they separate themselves from it."

ART. III. THE DIVINE AND ECCLESIASTICAL LAW

136. The last clause of canon 1060 draws attention to the fact that when there is danger of perversion of the Catholic party and the offspring the marriage is forbidden also by the divine law,—"*quod si adsit perversionis periculum coniugis catholici et prolis, coniugium ipsa etiam lege divina vetatur.*" The conjunction "*et*" in the phrase "*coniugis catholici et prolis*" should not, however, be interpreted to mean that the danger of perversion must exist for *both* the Catholic party *and* the offspring before the divine law would urge its prohibition. If either the Catholic party or the children, or both, were thus endangered, the divine law would forbid the union." The

⁷¹ Cf. Leitner, *Lehrb. des kath. Eherechts*, p. 235.

⁷² Cf. Blat, *Comment.*, Vol. III, P. I, n. 455. The same rules will apply also for schismatics. While the older decisions do not explicitly use the term "sect" with reference to schismatics, the membership in a sect was in all probability required. Cf. S. C. de Prop. F., 21 Mart. 1759,—*Coll.*, n. 415; 18 Feb. 1783,—*Coll.*, n. 562 (See No. 122, note 20); 11 Apr. 1894,—ASS, XXVII (1894-1895), 383; S. C. Conc., 28 Mart. 1908,—ASS, XLI (1908), 288. Marriages of Latin Catholics with members of the Uniate Eastern Churches are, of course, permitted.

⁷³ In a particular instance it might readily be possible that through steadfastness of faith the danger of perversion would be remote for the Catholic party while a valid presumption would exist concerning the proximate danger of perversion for the children.

last clause of canon 1060 indicates the province of the divine law; the first clause refers to the prohibition of the Church in the form of an impediment. The Church dispenses from the impediment but not from the divine law. When the Church does grant a dispensation from the impediment she implicitly declares the cessation of the divine prohibition.

ART. IV. CANONS 1065 AND 1066

137. With regard to the marriages of Catholics with those who have notoriously left the Faith or joined condemned societies, or with public sinners or those notoriously under censure, the Code has established the following discipline.

CANON 1065, § 1

Absterreantur quoque fideles a matrimonio contrahendo cum iis qui notorie aut catholicam fidem abiecerunt, etsi ad sectam acatholicam non transierint, aut societatibus ab Ecclesia damnatis adscripti sunt.

CANON 1066

Si publicus peccator aut censura notorie innodatus prius ad sacramentalem confessionem accedere aut cum Ecclesia reconciliari recusaverit, parochus eius matrimonio ne assistat, nisi gravis urgeat causa, de qua, si fieri possit, consulat Ordinarium.

It is well to note that canons 1065 and 1066 are not to be included under the impediment of Mixed Religion. They deal with a prohibition distinct from the impediment of Mixed Religion.

§ I. "*Qui notorie catholicam fidem abiecerunt*"

138. Most authors regard those who have notoriously left the Faith as apostates,⁸⁰ though the note of heresy seems likewise to be included.⁸¹ The following may be regarded as having

⁸⁰ Cf. Augustine, *Commentary*, V, p. 155; Ayrinhac, *Marriage Legislation*, p. 131; Blat, *Comment.*, Vol. III, P. I, n. 460; Cerato, *Matr.*, n. 59; Chelodi, *Ius Matr.*, n. 66; De Smet, *De Spons. et Matr.*, p. 163, not. 3; Farrugia, *De Matr.*, n. 139; Wernz-Vidal, *Ius Canonicum*, V, n. 201; Vlaming, *Prael. Iuris Matr.*, n. 244.

⁸¹ Cf. Cappello, *De Sacram.*, III, n. 330; De Smet, *loc. cit.*

rejected the Faith in the sense of canon 1065: atheists, deists, pantheists, rationalists, modernists in religion, and materialists;²² those, moreover, who have rejected the Catholic Faith by frequent and public denials of the teachings of the Church; those who have exposed the teachings of the Church to ridicule; those who have openly professed an avowed disobedience to the Church;²³ those who publicly deny they are Catholics;²⁴ and those who are notoriously²⁵ under censure for heresy or apostasy. Those baptized non-Catholics who *by a positive act* have left the sect in which they were baptized, or to which they were ascribed, and who at the time of the marriage remain unattached to a non-Catholic sect, must come under the provisions of this canon. Excluded from those who have notoriously rejected the Faith in the sense of canon 1065 are the following: a) those who, though neglecting their religious duties, have not renounced the Faith publicly by word or act; b) those who are members of non-Catholic sects; c) those laboring under excommunications incurred *latae sententiae* for heresy or apostasy, but who have not been juridically declared as excommunicated; d) and those who are suspected of heresy.

§ II. "*Qui notorie societatibus ab Ecclesia damnatis adscripti sunt*"

139. Under the heading of condemned societies the following classes may be enumerated: Anti-Social, Secret, Bible, and Cremation Societies.²⁶ Anti-Social Societies are those that

²² Cerato, *loc. cit.*; Farrugia, *loc. cit.*

²³ Vermeersch-Creusen, *Epitome*, II, n. 335.

²⁴ Wernz-Vidal, *loc. cit.*; Vlaming, *loc. cit.*; De Smet, *loc. cit.*

²⁵ A declaratory or condemnatory sentence of excommunication would establish this notoriety.

²⁶ Catholics are forbidden to join Theosophical Societies. Cf. S. C. S. Off., 18 Jul. 1919.—AAS, XI (1919), 317. "There is an esoteric section to which only members of a year's standing are admitted, and which is admittedly a secret society."—Quigley, *Condemned Societies*, p. 9. Cerato (*Matr.*, n. 59) includes Theosophical Societies among those contemplated in canon 1065. In their capacity of religious sects, however, such groups come under the provisions of canon 1060. It appears that the Jansenists come under the heading of an heretical sect. Cf. Vlaming, *Prael. Iuris Matr.*, Vol. I, p. 194, not. 1.

conspire or plot against either the Church or State or both.¹⁷ Secret societies are organizations, the members of which are bound to secrecy concerning their constitutions, purposes, means, and the like. Bible Societies are Protestant associations founded for the purpose of translating the Sacred Scriptures, publishing them without note or comment, rejecting usually the Deutero-Canonical Books as apocryphal, and distributing the Bibles at cost, less than cost, or gratis.¹⁸ Cremation Societies are associations whose purpose is the furtherance of the practice of cremation.¹⁹

140. Societies may be condemned *explicitly* ("nominatim"), i. e., by name, or *implicitly*, i. e., inasmuch as they bear those characteristics which designate them as societies that are under general condemnation. Membership in condemned societies may be forbidden *under censure*, i. e., under pain of excommunication, or *sub gravi*, i. e., under pain of mortal sin.²⁰ By way of example, the following societies are condemned: Masons, Sons of Temperance, Knights of Pythias, Odd Fellows, and the Independent Order of Good Templars.²¹ In order

¹⁷ Quigley, *op. cit.*, p. 7; Cerato, *Matr.*, n. 59. Under Anti-Social Societies may be grouped anarchistic, nihilistic, and communistic societies. Cappello (*De Sacram.*, III, n. 330) includes *truly* socialistic societies. De Smet (*De Spons. et Matr.*, p. 164, not. 1) quotes De Brabandere-Van Coillie to the effect that socialism is to be classed with the Masonic Order, yet he limits it to those members who are truly imbued with socialistic principles. He would, therefore, relieve from the censure of canon 2335 the ordinary rank and file members. Cf. Genicot-Salsmans, *Theol. Mor.*, II, n. 594. Farrugia (*De Matr.*, n. 139) includes those socialistic societies that would not hesitate to overthrow the government to attain their end. Vlaming (*op. cit.*, n. 245) seems to object to the inclusion of socialists on the ground that membership in their ranks is not condemned under censure.

¹⁸ The British and Foreign Bible Society. The American Bible Society, and the Gideons, are the best known examples.

¹⁹ The preceding definitions have been taken practically verbatim from Quigley, *Condemned Societies*, p. 8-9.

²⁰ Quigley, *op. cit.*, p. 9-10. Using the argument that the question at hand treats on matter "*de odiosis*", Petrovits (*New Church Law on Matrimony*, n. 200) restricts the phrase "*societatibus ab Ecclesia damnatis*" to those which are condemned "*nominatim*". See also Augustine, *Commentary*, V, p. 156; Vlaming, *Prael. Iuris Matr.*, n. 245. The argument does not seem to be conclusive and Quigley's opinion (*op. cit.*, p. 102-103) which includes all societies that are condemned explicitly, implicitly, under pain of censure, or mortal sin, appears to have a more solid foundation. Canon 1065, § 1 makes no distinction with regard to the manner of the condemnation of a society.

²¹ Though several authors (Farrugia, *De Matr.*, n. 139; Cappello, *De Sacram.*, III, n. 330; Leitner, *Lehrb. des kath. Eherechts*, p. 251) list the

that the conditions postulated in canon 1065, § 1 be realized, it is necessary that those concerned be true members ("adscripti") of condemned societies. The notoriety required may be one of fact or of law.⁴²

§ III. "*Publicus peccator aut censura notorie innodatus*"

141. A public sinner is one whose grave delinquency is known to many in the community in which the marriage is to take place. The publicity may be one of fact or of law.⁴³ The notoriety of law may also be established through a sentence of a civil court, in matters that lie within its competence.⁴⁴ The Roman Ritual⁴⁵ in speaking of those who are to be denied communion directs: "*Arcendi autem sunt publici indigni, quales sunt excommunicati, interdicti, manifestoque infames . . .*" Those notoriously under censure are those who are recognized as excommunicated by a condemnatory or declaratory sentence. Those also are included who have committed a crime which, "publicly known to be punished by excommunication, is committed under such circumstances that it cannot be concealed by any artifice or excused by any subterfuge of law."⁴⁶

§ IV. PROHIBITION OR IMPEDIMENT?

142. Catholics are, indeed, to be deterred from entering marriages with those who notoriously have renounced the Faith

Carbonari, the Fenians, and the Clerico-Liberalists, their inclusion is of little practical value for they no longer exist. Cf. Quigley, *op. cit.*, p. 102. Cappello (*loc. cit.*), Farrugia (*loc. cit.*), and Cerato (*Matr.*, n. 59) may be justified in listing "Old Catholics" among condemned societies (cf. S. C. S. Off., 17 Sept. 1871.—*A&KR*, XXVII [1872], CLXXI), though they are probably more accurately designated as a schismatic sect. Quigley (*loc. cit.*) characterizes them as a sect. The latter author is also of the opinion that the Y. M. C. A. is not a condemned society though Cappello and Farrugia deem it to be such. Cf. S. C. S. Off., 5 Nov. 1920.—*AAS*, XII (1920), 595-597. The London Society for the Propagation of Christian Unity seems to come under the heading of a condemned society. Cf. S. C. S. Off., 4 Jul 1919.—*AAS*, XI (1919), 309.

⁴² Cf. Cappello, *De Sacram.*, III, n. 330; Quigley, *Condemned Societies*, p. 101.

⁴³ Cf. Cappello, *De Sacram.*, I, n. 74; III, n. 332; Cerato, *Matr.*, n. 60; Chelodi, *Ius Matr.*, n. 67; Petrovits, *New Church Law on Matrimony*, n. 201; De Smet, *De Spons. et Matr.*, p. 162, not. 5.

⁴⁴ Chelodi, *Ius Poenale*, p. 6, not. 1.

⁴⁵ Tit. IV, cap. I, n. 8.

⁴⁶ Hyland, *Excommunication*, p. 101. See canon 2197, n. 3.

or who are members of condemned societies, with public sinners, or with those notoriously under censure, yet the prohibition, in the opinion of the vast majority of authors who have written after the Code, is not to be regarded as an impediment."⁴²

143. The reasons alleged by the few authors who have discussed the question as to why unworthiness is not an impediment do not, however, seem to be entirely adequate. Cerato,⁴³ when speaking of canon 1065, is of the opinion that the canon does not establish an impediment reserved to the Holy See, on the probable ground that such unions do not bear so great a presumption of perversion as do mixed marriages; that they are more frequent [?]; that prudence, therefore, would designate the local Ordinary as the best judge of the safeguards to be employed. Wernz-Vidal⁴⁴ maintains that the Church in establishing the impediments regards marriage *in se* and not under the aspect of a sacrament,—that the Church cannot remove the unworthiness of reception of the sacrament by dispensation.

144. Quigley⁴⁵ gives by far the most complete discussion of the question, developing the idea suggested by Wernz-Vidal.⁴⁶ The argument, as he presents it, may be summarized as follows. A matrimonial impediment directly affects marriage as a contract, and only indirectly as a sacrament. The sacrament of matrimony is unlawfully or invalidly received because the matrimonial contract is illicit or invalid. Unworthiness is found-

⁴² Cf. Cerato, *Matr.*, n. 61; Chelodi, *Ius Matr.*, n. 65; Vlaming, *Prael. Iuris Matr.*, n. 243; Wernz-Vidal, *Ius Canonicum*, V, nn. 173, 200-201; Hilling, *Das Eherecht des C. I. C.*, p. 55; Farrugia, *De Matr.*, n. 139; Ayrinhac, *Marriage Legislation*, p. 132; Blat, *Comment.*, Vol. III, P. I, n. 460; Vermeersch-Creusen, *Epitome*, II, n. 335; Augustine, *Commentary*, V, p. 135; Genicot-Salsmans, *Theol. Mor.*, II, n. 509; Noldin, *Theol. Mor.*, III, nn. 562, 567; Quigley, *Condemned Societies*, p. 97-100; O'Keeffe, *Matrimonial Dispensations*, p. 187-188. Petrovits (*New Church Law on Matrimony*, n. 199) seems, however, to regard it as an impediment. With reference to the opinions of canonists who wrote before the Code, the following representative authors may be consulted: Sanchez, *De Matr.*, Lib. VII, Disp. 9; Pontius, *De Sacram. Matr.*, Lib. VI, cap. 10; Alphonsus, *Theol. Mor.*, Lib. VI, n. 54; Benedictus XIV, *De Synodo Dioec.*, Lib. VIII, cap. XIV, n. 5; De Becker, *De Spons. et Matr.*, p. 265-274; Gasparri, *De Matr.*, nn. 476, 526-537.

⁴³ *Matr.*, n. 59.

⁴⁴ *Ius Canonicum*, V, n. 200.

⁴⁵ *Condemned Societies*, p. 97-99.

⁴⁶ See also O'Keeffe, *Matrimonial Dispensations*, p. 187-188.

ed on mortal sin which does not impede the reception of the sacrament but rather places an *obex* to the reception of the grace of the sacrament. Since matrimonial impediments directly affect the contract of marriage and unworthiness merely suspends the effects of the sacrament, it remains that unworthiness is not a canonical impediment. Moreover, impediments are removed by dispensation, but no dispensation could remove unworthiness.

145. The statement that an impediment directly affects the contract and only indirectly the sacrament is not to be challenged. Nay more, the very prohibition of canon 1065 demands that the faithful be deterred from contracting marriage with the unworthy,—“*Absterreantur quoque fideles A MATRIMONIO CONTRAHENDO.*” Some inaccuracy in the discussion seems to result in confusing the juridic fact of the prohibition itself with unworthiness, which is its basis. While unworthiness directly impedes the effect of the sacrament (and not the contract), it is not correct to say that *the prohibition* directly impedes the effect of the sacrament. If unworthiness is not an impediment because dispensation cannot remove it, it would be equally logical to say that Mixed Religion is not an impediment because adherence to a non-Catholic sect is not removed by dispensation. In like manner, Disparity of Cult would not be an impediment because a dispensation cannot remove the non-baptism of the unbaptized. The argument seems to be based on the assumption that an impediment or a prohibition which directly affects the contract of marriage may not derive the reason for its existence from a consideration of the *sacrament* of marriage.

146. The very foundation of the diriment force of the impediment of Disparity of Cult is derived from the nature of the sacrament of Matrimony. Mixed Religion has a partial foundation in the same reason. A dispensation from these impediments removes *only the impediments*, which, however, have a foundation in the very sacrament of Matrimony. Permissions given by the Ordinary to pastors to assist at the marriage of a Catholic to an unworthy person cancel the *prohibition* which is derived from a consideration of the holiness of a sacrament. *The basis of the prohibition* in canon 1065 should not be compared with the impediments but with the *basis* of the impe-

diments. The reason assigned by Wernz-Vidal and Quigley does not seem to clarify the issue why an impediment should stand in the way of marriages with the unbaptized and sectarian non-Catholics, and why only a prohibition should stand in the way of a pastoral witnessing of the marriages of Catholics with notorious apostates, heretics, members of condemned societies, public sinners, and the notoriously censured. Perhaps a few of the difficulties may be removed by comparing the *basis* of the prohibition with the *basis* of the impediments of Mixed Religion and Disparity of Cult.

147. Disparity of Cult is a diriment impediment because it is founded on the radical inequality existing between the baptized and the unbaptized. Mixed Religion is a prohibitive impediment because it represents *an accentuated modal inequality* between Catholics and sectarian baptized non-Catholics. The marriages contemplated in canons 1065 and 1066 are prohibited likewise on the basis of a modal difference existing between practical Catholics and the unworthy. The reason why unworthiness is not the basis of an impediment, but rather of a prohibition appears to rest on the fact that unworthiness does not represent the *accentuated* modal difference implied in the impediment of Mixed Religion.¹²

¹² See Nos. 119-124.

CHAPTER IX
THE DIRIMENT IMPEDIMENT OF DISPARITY
OF CULT

CANON 1070, § 1

Nullum est matrimonium contractum a persona non baptizata cum persona baptizata in Ecclesia catholica vel ad eandem ex haeresi aut schismate conversa.

ART. I. "*Nullum est matrimonium contractum a persona non baptizata*"

148. The nature of the impediment of Disparity of Cult is wholly distinguished from that of Mixed Religion by the fact that it is a diriment impediment ("*NULLUM est matrimonium*"). The reason, moreover, which forms the very basis of the dirimency of the impediment is founded on the radical disparity existing between the baptized and the unbaptized. One essential condition, therefore, for the existence of the impediment of Disparity of Cult is that one of the parties to a marriage must be unbaptized ("*persona non baptizata*"),—that one party should lack the baptismal character which is required for a sacramental marriage. The other party must be baptized in order that the radical disparity exist.

149. In the law before the Code the conditions of the impediment were realized when one party was validly baptized and the other was not baptized. It mattered not that the Baptism was conferred in an heretical or schismatic sect, provided that the Baptism was valid.¹ The diriment force of the impe-

¹ Cf. Benedictus XIV, ep. *Singulari*, 9 Feb. 1749,—*Fontes*, n. 394; S. C. S. Off., instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5,—*Fontes*, n. 866; 3 Apr. 1878,—Aichner, *Compend. Juris Eccles.*, § 173, not. 4; (ad Vic. Ap. Iaponiae Merid.), 4 Feb. 1891,—*Fontes*, n. 1130; Feije, *De Imped. et Dispens.*, n. 459; Wernz, *Ius Decret.*, IV, n. 506; Schulte, *Handb. des kath. Eherechts*, p. 224; Gasparri, *De Matr.*, n. 685.

diment did not rest upon the difference of a profession of faith at the time of the marriage³ but upon the disparity arising between those who had been baptized and those who had not been baptized.

ART. II. "*Cum persona baptizata in Ecclesia catholica vel ad eandem ex haeresi aut schismate conversa*"

150. The change that was introduced by the Code did, indeed, restrict the extension of the impediment, but it did not thereby alter in any way the fundamental reason for the dirimency of the impediment which in the Code, as in the law that preceded it, still has its ultimate foundation in the radical disparity existing between the baptized and the unbaptized. The restriction to Baptism in the Catholic Church, or conversion to the Church from heresy or schism, did, however, introduce a momentous change. Heretics and schismatics who have not received Baptism in the Catholic Church or who have never at any time been converted to it were for the future thereby liberated from the ambit of the impediment when contracting marriage with the unbaptized.

§ I. REASON FOR THE CHANGE

151. But why the restriction? The authors who have attempted to explain the change allege several reasons which may be briefly summarized under three headings: 1) the doubtful validity of Baptism as it is administered in many sects;³ 2) the non-reception of Baptism by many non-Catholics;⁴ 3) the reduction of the number of invalid marriages amongst heretics and schismatics.⁵ The reasons summarized under the last two headings appear to be sufficiently adequate without introducing the question of the doubtful validity of Baptisms conferred in

³ The profession of faith has, likewise, nothing to do with the law of the Code as it is expressed in canon 1070, § 1.

⁴ Cappello, *De Sacram.*, III, n. 414; Chelodi, *Ius Matr.*, n. 79; Wernz-Vidal, *Ius Canonikum*, V, n. 265; De Smet, *De Spons. et Matr.*, p. 513, not. 6; Noldin, *Theol. Mor.*, III, n. 578, 3c.

⁵ Ayrinhac, *Marriage Legislation*, p. 149.

⁶ The authors enumerated in the preceding two notes offer also this reason. Vermeersch (*Theol. Mor.*, III, n. 779) and Farrugia (*De Matr.*, n. 169) give it as the principal reason.

some sects. The doubt of the validity of a Baptism may on investigation be either solved or remain unsolved. If the doubt admits of a solution and both parties are found to be baptized there is no question of the impediment. If one party is found to be unbaptized, the existence of the impediment will be demonstrated. When the doubt cannot be solved by direct proofs it may be solved by a resort to various presumptions that have been established by the Holy See as norms.*

152. The fact, as Ayrinhac⁷ well observes, that many non-Catholics of today have never received Baptism gives rise to a condition truly grave, for, since their marriages with those validly baptized in the sects are quite frequent, the number of invalid marriages among non-Catholics would thereby be greatly increased. While in many instances such marriages would in all probability be putative,⁸ thus conferring legitimacy to the children, the fact of their objective invalidity was a public evil that the Church seemed bent on relieving. Much of the reason that prompted the release of non-Catholics by the decree "*Ne Temere*" from the form of marriage, to which baptized non-Catholics had been bound by the decree "*Tametsi*", may well have exerted its cogency in determining the Church's restriction of the impediment of Disparity of Cult. In both instances it was a merciful release on the part of the Church.⁹

A. CANONS 1070, § 1 and 1099, § 2

153. The reason which is drawn from an analogy to the exemption of the decree "*Ne Temere*" has its limitations, however, for though the Church under the law of the decree "*Ne Temere*" appeared reluctant to commit herself on the question of releasing from the form of marriage those born of non-Catholic parents, baptized in the Catholic Church, but raised

* The question of doubtful Baptism is discussed in the next Chapter.

⁷ *Loc. cit.*

⁸ See No. 264, note 107.

⁹ "Haec sapienti provisione Ecclesia sinit esse valida quam plurima matrimonia quae, sine eius dispensatione, *haeretici* cum non baptizatis contrahunt."—Vermeersch, *Theol. Mor.*, III, n. 779. Vide etiam Vermeersch, "De canone 1070, § 1 eiusque opportunitate", *Periodica* (II novae seriei, Fasc. II), Romae, 1928, XVII, 55.

from infancy in heresy, schism, or irreligion," she did release them definitely in the Code." Canon 1070, § 1, does not, however, grant this latter exception and here the parity fails.

154. Some authors, indeed, have sought to draw the exception of canon 1099, § 2 to canon 1070, § 1,¹⁰ or at least to raise the question of its doubtful application,¹¹ though they are outnumbered by those who deny the exception.¹² The probability that the more liberal opinion may have enjoyed for a time appears to have lost its force with a decision of the Holy Office transmitted by the Congregation of the Propaganda on April 1, 1922. A certain man born in 1898 of infidel parents was, at the danger of death in infancy, baptized ("*in scis parentibus*") by a Catholic doctor. He was raised from infancy in infidelity. Towards the end of the year 1918 he married an unbaptized woman. The case was sent to the Holy See, and the answer received ordered the declaration of nullity to be given on the ground of the impediment of Disparity of Cult.¹³

155. On the other hand the provision of canon 1099, § 1, n. 1 holds also for canon 1070, § 1 so that those who have

¹⁰ Cf. S. C. S. Off., 31 Mart. 1911,—AAS, III (1911), 163-164.

¹¹ Canon 1099, § 2.

¹² Cf. Durieux, *The Busy Pastor's Book on Matrimony*, p. 93, note 120.

¹³ Genicot-Salsmans (*Theol. Mor.*, II, n. 491) would refer the matter to the Holy See. Vlaming (*Prael. Juris Matr.*, n. 289) takes refuge in the decree of March 31, 1911 (AAS, III [1911], 163-164) and arrives at the same conclusion. Cf. Knecht, *Grundriss des Eherechts*, p. 72. Cappello (*De Sacram.*, III, n. 412, not. 3) denies the force of an argument based on the decree of March 31, 1911, but with Wernz-Vidal (*Ius Canonicum*, V, n. 263, not. 24) admits the doubt.

¹⁴ Cf. De Smet, *De Spons. et Matr.*, n. 586; p. 513, not. 7; p. 514, not. 1; Petrovits, *New Church Law on Matrimony*, n. 230; Hilling, *Das Eherecht des C. I. C.*, p. 29; AkKR, CVII (1927), 178-179; Ayrintnac, *Marriage Legislation*, p. 149; Vermeersch, *Theol. Mor.*, III, n. 779; Vermeersch-Creusen, *Epitome*, II, n. 344; Creusen, "L'empêchement de disparité de culte", *NRT*, LII (1925), 495-497; Augustine, *Commentary*, V, p. 182-183; Woywod, *A Practical Commentary*, I, n. 1053; Blat, *Comment.*, Vol. III, P. I, n. 501.

¹⁵ "1. An matrimonium a viro Thac in fine anni 1918 contractum fuerit validum? 2. Si fuit validum, an possit rescindi vi privilegii paulini, ita ut Thac possit uxore interpellata negative respondente, aliud connubium cum muliere catholica inire?" R. "Amplitudini Tue communico Sacram Congregationem S. Officii examinasse casum matrimoniale Thac-Nam istius Vicariatus, et respondiisse matrimonium hoc Thac-Nam a te declarandum esse nullum, ob impedimentum *disparitatis cultus*."—S. C. de Prop. F., 1 Apr. 1922,—*NRT*, LII (1925), 497-498; AkKR, CVII (1927), 179-180.

been baptized in the Catholic Church or converted to it, are not liberated from the impediment of Disparity of Cult by a rejection of the Catholic Faith.¹⁶ The reason why the exception of canon 1099, § 2, does not hold for canon 1070, § 1, may rest in the fact that since a disparate marriage does violence (*per se*) to the sacramental character of marriage, it is of graver moment than the matter of clandestinity. The exemption from the law regarding the form of marriage seems to have a further reason in the fact that the law pertaining to clandestinity covers a much wider field than the impediment of Disparity of Cult,—it affects every marriage where one of the parties is bound to the form, whereas the impediment of Disparity of Cult affects only those marriages in which one of the parties is unbaptized. It may well be that for such reasons the Church, in granting an exception from the law regarding the form in canon 1099, § 2, was unwilling to extend it to her discipline on disparate marriages.

B. ORIENTALS

156. The restriction of the Code to Baptism in the Catholic Church, or conversion thereto from heresy or schism, does not, however, affect the Oriental Churches, whether they be united to Rome or separated through schism or heresy.¹⁷ Not, indeed, that Baptism in the Uniate Churches or conversion to them would not be Baptism in the Catholic Church or conversion to the Catholic Faith, but rather by reason of the fact that the Latin discipline with regard to the limited extension of the impediment of Disparity of Cult does not affect the Oriental Churches.¹⁸ The Orientals are bound, however, to the universal prescriptions regarding the conditions, causes, and promises that arise in connection with the impediments of Mixed

¹⁶ Cerato, *Matr.*, n. 69; Chelodi, *Ius Matr.*, n. 79; Vlaming, *op. cit.*, n. 288; Wernz-Vidal, *op. cit.*, V, n. 262; De Smet, *op. cit.*, n. 586; Hilling, *op. cit.*, p. 29; Genicot-Salsmans, *op. cit.*, II, n. 491; *Casus Consc.*, n. 1007; Linneborn, *Grundriss des Eherechts*, p. 200; Blat, *Comment.*, Vol. III, P. I., n. 467; Noldin, *Theol. Mor.*, III, n. 578.

¹⁷ Cf. Petrovits, *New Church Law on Matrimony*, nn. 223, 228; Cappello, *De Sacram.*, III, n. 906; De Smet, *De Spons. et Matr.*, n. 140; Linneborn, *op. cit.*, p. 199.

¹⁸ "Licet in Codice iuris canonici Ecclesiae quoque Orientalis disciplina saepe referatur, ipse tamen unam respicit Latinam Ecclesiam, neque Orientalem obligat, nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt."—Canon 1.

Religion and Disparity of Cult." The discipline in the Oriental Churches united to Rome is substantially the same as it existed in the Latin Church before May 19, 1918.

157. Those born of parents belonging to an Oriental rite may not be baptized into the Latin rite,¹⁹ nor transferred thereto after Baptism without the permission of the Holy See. Perhaps even an Oriental schismatic or heretic may not be received into the Latin Church without this permission.²⁰ If one of the parents belongs to the Latin rite and the other to an Oriental, the children are to be baptized in the rite of the father unless a special provision rules otherwise for a particular group of the Orientals. If one of the parents be a Catholic, the child is to be baptized in the rite of the Catholic.²¹ The descendants, therefore, of those who had been received illicitly into the Latin rite do not appear to come under the Latin discipline. If in this line of descendants some would have fallen into heresies or schisms which represent a separation from the Latin Church, their progeny, if baptized in such heresy or schism, would still seem to be bound to the Oriental discipline. When, therefore, the Code in canon 1070, § 1 speaks of conversion from heresy or schism, it seems to regard primarily a conversion from heretical or schismatic sects which represent separations from the Latin Church. If there is to be a conversion from Oriental schism or heresy to the Latin Church, it is to be in accordance with the norms established by the Holy See.²²

§ II. "*Cum persona baptizata in Ecclesia catholica*"

A. WHAT IS BAPTISM IN THE CATHOLIC CHURCH?

158. Everyone that is validly baptized is, strictly speaking, by that very fact baptized into the Catholic Church and rendered

¹⁹ Cf. S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, nn. 4-6,—*Fontes*, n. 1112; Cappello, *loc. cit.*

²⁰ Cf. canon 756, § 1; Duskie, *The Canonical Status of the Orientals in the United States*, p. 72-84.

²¹ Cf. canon 98, § 3. The Holy See has declared that an Oriental schismatic or heretic could choose any one of the recognized Oriental rites when returning to the Church. Cf. S. C. de Prop. F., 20 Nov. 1838,—*Coll.*, n. 878; 7 Apr. 1859,—*Coll.*, I, p. 500, not. 1, May not this imply that the choice is restricted to *Oriental* rites?

²² Canon 756, §§ 2-3.

²³ See No. 157, note 21.

subject to it.²⁴ Yet canon 1070, § 1, in using the clause "*baptizata in Ecclesia catholica*" speaks of Baptism in a more restricted sense,²⁵ having regard rather for the *finis operantis* than the *finis operis* of the sacrament of Baptism.²⁶ ". . . All who are baptized are, and must be, baptized *into* the Catholic Church, by whomsoever they may be baptized. But this is not the same as being baptized *in* the Catholic Church. Heretics and schismatics administer the sacrament of Baptism, as well as the Catholic Church, and so the phrase 'baptized in the Catholic Church' is used in the Decree [*"Ne Temere"*]²⁷ to distinguish those who are baptized as *Catholics*, as *acknowledged* members of the Catholic Church, from those who are baptized as schismatics or heretics."²⁸

B. WHO ARE BAPTIZED IN THE CATHOLIC CHURCH?

159. In determining who are baptized in the Catholic Church it will be necessary to keep constantly in mind: the intention of the parents or guardians with regard to infants; the intention of the person himself who is an adult; and the intention of the one administering the sacrament. Infants are those who at the time of Baptism have not yet arrived at the use of reason. Those who have been insane from infancy are likewise to be regarded as infants, regardless of age.²⁹ Adults are

²⁴ Cf. Conc. Trident., sess. VII, *de baptismo*, can 7-8; CIC, canon 87; Vermeersch, *Theol. Mor.*, III, n. 779.

²⁵ "Allatae sunt Supremae huic Congregationi Sancti Officii preces Amplitudinis Tuae quibus petis num impedimentum disparitatis cultus, de quo in can 1079 [manifestly a misprint and should read can. 1070] CJC restringatur ad matrimonium catholicorum cum non baptizatis, an etiam applicandum sit ad matrimonia baptizatorum acatholicorum cum non baptizatis. Significo Tibi, nomine eiusdem Congregationis, impedimentum hoc ad normam ipsius can. 1070 tenere catholicos, non autem acatholicos, nisi hi fuerint baptizati in Ecclesia catholica aut ad eam conversi. Res adeo clara est, ut nullum de ea dubium habere liceat."—Card. Merry del Val,—S. C. S. Off. (ad Archiep. Friburgen.), 21 Dec. 1924.—*AkkR*, CV (1925), 202.

²⁶ Cf. Cappello, *De Sacram.*, III, n. 411; Vlaming, *Prael. Iuris Matr.*, n. 289; Wernz-Vidal, *Ius Canonicum*, V, n. 263. Vide etiam Wouters, *Comment. in Decretum "Ne Temere"*, p. 77.

²⁷ The clause "baptized in the Catholic Church" of canon 1070, § 1 is used in the same sense as in the decree "*Ne Temere*", art. XI, § 1, leaving out the possibility of exemption for the *form* of marriage that may be suggested by the decree of the Holy Office of March 31, 1911, (AAS, III [1911], 163-164). Cf. Petrovits, *New Church Law on Matrimony*, n. 222.

²⁸ Cronin, *The New Matrimonial Legislation*, p. 273.

²⁹ Canon 745, § 2, n. 1.

those who at the moment of Baptism enjoy the use of reason, or, in the case of the insane, those who have at any time enjoyed the use of reason.¹⁶⁰ Parents are the natural interpreters of the child's intention who in the age of infancy cannot determine it.¹⁶¹

1. OUTSIDE OF URGENT NECESSITY

160. In normal cases, therefore, the Baptism that an infant receives (i. e., with reference to Baptism in the Catholic Church or in a non-Catholic denomination) will be manifest by the intention of the parents when presenting the child for Baptism to the minister of that church in which they wish to have the infant enrolled.¹⁶² The same will be true of infants presented by guardians who have become the legitimate interpreters of the child's intention through the transfer of parental authority.¹⁶³

161. In mixed and disparate marriages which have been contracted with a dispensation conditioned on the giving of the *cautiones*, the intention of the parents will normally be presumed to be that of seeking Baptism in the Catholic Church for their children, unless their intention is manifest to the contrary. The Baptism of children born of mixed or disparate marriages contracted without the *cautiones* may present some difficulties, especially if the parents themselves disagree on the matter and if the child is presented by the non-Catholic before a non-Catholic minister against the will of the Catholic.¹⁶⁴ If

¹⁶⁰ Cf. canons 745, § 2, n. 2; 754, § 1.

¹⁶¹ "Si vero nondum habent usum liberi arbitrii, secundum ius naturale sunt sub cura parentum, quamdiu ipsi sibi providere non possunt; unde etiam de pueris antiquorum dicitur, quod salvabantur in fide parentum . . ."—Thomas Aq., *Summa Theol.*, IIIa, q. 68, art. 10, resp.. Vide etiam IIa - IIae, q. 10, art. 12.

¹⁶² Cf. Petrovits, *New Church Law on Matrimony*, n. 224, 4. Normally, parents will present the child to the minister of the church to which they themselves are ascribed. If, however, they willingly present the child to a minister of a denomination other than their own, the child is to be regarded as baptized in the church of that minister.

¹⁶³ Cf. Benedictus XIV, ep. *Postremo mense*, 28 Feb. 1747, n. 14.—*Fontes*, n. 377. Guardianship may be invested, for example, through the death of the parents, through a testament, or through their unconditional release of their rights over the child in favor of another.

¹⁶⁴ Perhaps in this latter case the child is not to be regarded as having received Baptism in the Catholic Church. But see *infra* Nos. 170, 182.

the child is presented to a Catholic minister by either one of the parents, even against the will of the other, the Baptism is to be regarded as Catholic, especially if it is administered in conformity with the norms established by the Church.⁸⁵

a. Baptism Conferred in Violation of Canons 750 and 751

162. If there is due provision for their Catholic education, a Catholic may licitly baptize the infant children of infidels, heretics, schismatics, and fallen-away Catholics provided: that at least one of the parents or guardians consent; or that at the time of the Baptism the child has no parents, grandparents, or guardians,—or that they have lost their right over the child, or cannot in any way exercise it.⁸⁶ If Baptism is conferred in accordance with these rules demanded by canons 750 and 751, the Baptism is to be regarded as Catholic Baptism and those infants receiving it will be bound by the impediment of Disparity of Cult when marrying the unbaptized.⁸⁷

163. On the other hand, if Baptism is administered illicitly, i. e., contrary to the provisions of canon 750, § 2, nn. 1-2, it will be in violation of the natural right of the parents, with the consequent moral certainty of the children's pervers-

⁸⁵ These norms will be found in the following instructions and decisions: Benedictus XIV, ep. encycl. *Inter omnigenas*, 2 Feb. 1744, § 8,—*Fontes*, n. 339; ep. *Postremo mense*, 28 Feb. 1747, nn. 15-16,—*Fontes*, n. 377; S. C. S. Off., 12 Oct. 1600,—*Fontes*, n. 714; 8 Feb. 1624,—*Fontes*, n. 718; 17 Sept. 1671,—*Fontes*, n. 747; (*Hiberniae*), 29 Nov. 1672,—*Fontes*, n. 751; 14 Oct. 1676,—*Fontes*, n. 753; 18 Nov. 1745,—*Fontes*, n. 796; (*Sutchuen.*), 12 Jan. 1769,—*Coll.*, n. 471; (*Promont. Bonae Spei*), 22 Jul. 1840,—*Fontes*, n. 882; 6 Jul. 1898, ad 4-5,—*Fontes*, n. 1200. (The last decision regards the case of a dying Catholic parent, married civilly to a non-Catholic.)

⁸⁶ Cf. canons 750, § 2, nn. 1-2; 751; Benedictus XIV, ep. *Postremo mense*, 28 Feb. 1747, n. 14,—*Fontes*, n. 377; instr. S. C. de Prop. F., 17 Apr. 1777, nn. VII-VIII,—*Coll.*, n. 522.

⁸⁷ Vlamings, Genicot-Salsmans, Cappello, and Wernz-Vidal (see *infra* No. 154, note 13) doubt the validity of this conclusion, and the first two authors would have recourse to the Holy See. Vermeersch-Creusen (*Epitome*, II, n. 344), though disagreeing with the first three authors, admits the probability of their opinion. Hilling (*Das Eherecht des C. I. C.*, p. 30) admits that they are bound. The decision of the Congregation of the Propaganda of April 1, 1922 (see *infra* No. 154, note 15) seems to remove the probability of the opinion sponsored by the first four authors mentioned.

sion.³³ Cappello,³⁴ Wernz-Vidal,³⁵ Hilling,³⁶ and Woywod³⁷ are of the opinion that an infant (whose parents are non-Catholics) baptized by a Catholic in violation of canons 750 and 751, and raised from infancy in heresy or schism, will not be bound by the impediment of Disparity of Cult when marrying an unbaptized person. It cannot be urged, however, that the Baptism thus illicitly administered, is not Baptism in the Catholic Church,³⁸ for the basic reason in forbidding it seems to rest on the danger of perversion.³⁹ Yet the supposition of a danger of perversion implies *Baptism in the Catholic Church*.⁴⁰

164. The liberation sponsored by the authors may, or may not, be in conformity with the mind of the Church. In as much as the Church forbids under pain of sin the illicit ad-

³³ "... et ideo contra iustitiam naturalem esset, si tales pueri invitis parentibus baptizarentur; sicut etiam si aliquis habens usum rationis baptizaretur invitus. Esset etiam periculosum taliter filios infidelium baptizare: quia facili ad infidelitatem redirent, propter naturalem affectum ad parentes."—Thomas Aq., *Summa Theol.*, IIIa, q. 68, art. 10, resp.; IIa - IIae, q. 10, art. 12. Cf. Suarez, Quaest. LXVIII, *De Suscipientibus Baptismum*, art. 10, sect. 3-5; Benedictus XIV, ep. *Postremo mense*, 28 Feb. 1747, nn. 6-7, 22-23, 27,—*Fontes*, n. 377.

³⁴ *De Sacram.*, III, n. 412.

³⁵ *Ius Canonicum*, V, n. 263.

³⁶ *Das Eherecht des C. I. C.*, p. 29-30. Cf. *AkKR*, CVII (1927), 180-181.

³⁷ *A Practical Commentary*, I, n. 1053. Wouters (*Comment. in Decretum "Ne Temere"*, p. 78) also seems to insinuate an agreement when he says: "si quis baptizatur in ordine ad Ecclesiam catholicam ex sola intentione legitime seu licite baptizantis, etiamsi ii qui infantibus praesunt, non consentiant." Cf. Vermeersch, *De Forma Spons. ac Matr. post Decretum "Ne Temere"*, n. 87.

³⁸ Vlaming (*Prael. Iuris Matr.*, n. 598), however, in speaking of canon 1099, seems to deny that those baptized contrary to canons 750 and 751 receive Catholic Baptism. Hilling (*AkKR*, CVII [1927], 180-181) is of the same opinion. "... es liegt gar kein Grund vor, Kinder protestantischer Eltern, die unrechtmässiger Weise in der katholischen Kirche getauft, aber von Jugend auf in der protestantischen Religion erzogen sind, anders zu behandeln, als solche Kinder, die nach dem Willen der protestantischen Eltern in der protestantischen Kirche getauft und erzogen sind."

³⁹ A study of the sources quoted in Cardinal Gasparri's notes to canons 750 and 751 will serve as confirmation. Cf. Labauche, *Three Sacraments of Initiation*, p. 104, note 1.

⁴⁰ There is no violation of parental rights with regard to the group enumerated in canon 751. Cf. King, *The Administration of the Sacraments to Dying Non-Catholics*, p. 36-37; Suarez, Quaest. LXVIII, *De Suscipientibus Baptismum*, art. 10, sect. 3, n. 2; Noldin, *Theol. Mor.*, III, n. 67; Labauche, *Three Sacraments of Initiation*, p. 103, note 2.

ministration of Baptism in the Catholic Church, it may be reasonable to suppose that she would be unwilling, in the light of her present legislation, to bind those baptized contrary to her law. In much the same manner as she would refuse to bind an Oriental to the Latin discipline through his illicit Baptism into the Latin rite, she may likewise refuse to bind by an impediment (which she restricts to those baptized in the Catholic Church or converted thereto) those unlawfully baptized in the Catholic Church, who from infancy have been brought up as non-Catholics. On the other hand, canon 1070, § 1 rules that those who have been baptized in the Catholic Church (regardless of their future profession of faith are bound by the impediment,—it offers no suggestion of an exception. The canon seems to be concerned with the *fact* of Catholic Baptism rather than with its licit or illicit administration. The matter lies wholly with the positive disposition of the Church. The question calls for practical solution only after a marriage has been contracted. In the absence of a definite pronouncement, it seems that a case of this kind should be sent to the Holy Office for decision.

b. Adults and the Insane

165. The words "Catholic Baptism" are applicable to those adults who in the reception of Baptism were actuated by the motive of becoming Catholics.⁴⁶ An adult who (while in a conscious state expressed his absolute unwillingness to receive Baptism) is baptized in an unconscious state; or an adult who, though conscious, is forced unwillingly to receive Baptism, would not be baptized validly for the intention of an adult is required for the validity of the sacrament.⁴⁷ An adult so baptized by a Catholic would not be bound by the impediment of Disparity of Cult. The Baptism of the insane (with reference to the impediment of Disparity of Cult) is to be judged according to the norms established in canon 754. The cases of urgent necessity will be discussed in due order.

⁴⁶ Petrovits, *New Church Law on Matrimony*, n. 224.

⁴⁷ Cf. canon 752, § 1; Cappello, *De Sacram.*, I, n. 154; Thomas Aq., *Summa Theol.*, IIIa, q. 68, art. 7-8. Suarez (Quaest. LXVIII, *De Suscipientibus Baptismum*, art. 7-8) after quoting the passage from St. Thomas, considers the question sufficiently clear to preclude the necessity of commenting on it.

2. URGENT NECESSITY

166. The Baptisms administered to infants in danger of death will present some difficulties and it will be well, therefore, to examine some of the possibilities in order to determine the nature of the Baptism conferred. Often the expressed or interpretative will of the parents or guardians may not be in accord with that of the baptizing minister. Cases may also arise where those who present the children for Baptism act contrary to the will of the parents.

a. Baptism *in utero*

167. The Baptism of an infant baptized *in utero* in accordance with canon 746, § 2 is to be judged according to the intention of the mother. *Antecedently* to a marriage with an unbaptized person or a person baptized *in utero* in violation of canons 750 or 751 the question of a pastor's assistance will normally arise only if the party under consideration is an actual professed Catholic. If this party has ever been a convert to the Catholic Church there is, indeed, need of a dispensation from the impediment of Disparity of Cult that he may contract a valid marriage, but the dispensation can be given only on the condition that at the time of the dispensation he is actually a professed Catholic. If, as a non-Catholic, he should seek to be married to an unbaptized person before a Catholic pastor, the pastor cannot assist until one or both parties to the marriage are received into the Church through conversion or (in the case of the unbaptized party) through Baptism. If one of the parties remains a sectarian non-Catholic or unbaptized there is need of the proper dispensation, either from the impediment of Mixed Religion or Disparity of Cult.

Post factum, if a person baptized *in utero* in violation of canons 750 or 751 (who from infancy has been brought up as a non-Catholic) has married an unbaptized person, the case should be referred to the Holy Office for decision. Baptism administered conditionally in accordance with canon 746, §§ 3-4 is doubtful Baptism and a marriage contracted by a person so baptized with an unbaptized person cannot be declared invalid.⁴⁴ This would be true, of course, only on the condition

⁴⁴ Cf. canon 1070, § 2.

that the doubtful Baptism has not been rendered certainly valid by the reception of conditional Baptism in the Catholic Church,⁴⁹ or by conversion to the Catholic Church if such a doubtful Baptism had been repeated conditionally (and rendered certainly valid) in heresy or schism.⁵⁰

b. Two Catholic Parents, or Parents in a Mixed or
Disparate Marriage Contracted with the
Cautiones

168. If a child (infant) of two Catholic parents be baptized in urgent necessity by a Catholic, the Catholic Baptism of the child cannot be questioned.⁵¹ Even if the child were baptized by an infidel, a baptized sectarian non-Catholic or non-sectarian non-Catholic, or by a fallen-away Catholic, the child should be regarded as having been baptized in the Catholic Church. The intention of the non-Catholic minister to incorporate the child into his sect would be impotent against the expressed or interpretative intention of the Catholic parents. The same may be said with regard to the expressed or interpretative intention of Catholic guardians who have become the legitimate interpreters of the child in infancy.⁵²

⁴⁹ Cf. canon 746, § 5.

⁵⁰ By virtue of the doubtful Baptism under consideration, the person would presumptively, indeed, be bound to the laws of the Church, (see *infra* No. 201, note 46; Nos. 220-221) but not to the prejudice of the validity of a marriage. The question would become practical only after a person thus doubtfully baptized (in the Catholic Church) had contracted a marriage with an unbaptized person. If the doubtful (Catholic) Baptism were known antecedently to the contracting of such a marriage, the person would first be baptized conditionally before proceeding to procure the necessary dispensation. If the person were not again conditionally baptized (canon 746, § 5) at the time of the contracting of the marriage with an unbaptized person, the rule "*standum est pro valore matrimonii*" would have to be applied. See canons 1014; 1070, § 2. In the light of canon 1070, § 2, a marriage between a person baptized in accordance with the prescriptions of canon 746, §§ 3-4 and an unbaptized person could not be declared invalid. A truly doubtful Baptism *in utero* (cf. canon 746, §§ 3-4) can never be proved (a condition demanded by canon 1070, § 2 for a declaration of nullity) to be valid.

⁵¹ Cf. Vermeersch, *De Forma Spons. ac Matr. post Decretum "Ne Temere"*, n. 87.

⁵² Petrovits (*New Church Law on Matrimony*, n. 277) postulates a case of two Catholic parents in urgent necessity, presenting in good faith their infant child for Baptism by a non-Catholic minister. It appears that unless an expressed wish of the parents signified their intention of incorporating the child into a non-Catholic sect, their interpretative intention of wishing it to be baptized into the Catholic Church is to be presumed. Cf. Wouters, *Comment. in Decretum "Ne Temere"*, p. 77.

169. Children born of mixed or disparate marriages, which have been contracted on the giving of the *cautiones*, should be regarded in the same light as those born of Catholic parents, when the question of Catholic Baptism arises. It is to be presumed that the parents by the *cautiones* have interpreted the intention of having the child baptized in the Catholic Church until the contrary is proved.¹⁰⁹

c. Parents in Mixed or Disparate Marriages Contracted without the *Cautiones*

170. Children born of mixed or disparate marriages contracted without the *cautiones* and baptized by a Catholic in danger of death, must be regarded as baptized in the Catholic Church, and bound by canon 1070, § 1.¹¹⁰ If such children were baptized by a non-Catholic, a serious doubt would arise as to whether they are to be regarded as baptized in the Catholic Church. Though the Church has a right to have them baptized as Catholics, the expressed or interpretative intention of the parents is not clearly determined as being in accord with this right, or as opposed to the intention of the non-Catholic minister. The marriage of those so baptized (who from infancy have been brought up as non-Catholics) contracted with the unbaptized should be submitted to the Holy Office for a decision as to their validity.¹¹¹

d. Two Non-Catholic Parents

171. If, in the case of danger of death, a Catholic baptizes the children of non-Catholic parents, even against the will of the parents or without their knowledge, the child is to be regarded as baptized in the Catholic Church and bound by can-

¹⁰⁹ Cf. Petrovits, *op. cit.*, n. 225.

¹¹⁰ Cf. S. C. S. Off., 3 Mart. 1633,—apud Benedictus XIV, ep. *Postremo mense*, 28 Feb. 1747, n. 27,—*Fontes*, n. 377; 6. Jul. 1898, ad 4,—*Fontes*, n. 1200; Wernz, *Ius Decret.*, IV, Pars I, p. 305-306; King, *The Administration of the Sacraments to Dying Non-Catholics*, p. 31-32; Augustine, *Commentary*, V, p. 297.

¹¹¹ Cf. Petrovits, *New Church Law on Matrimony*, n. 227. Antecedently to such marriages the norms given in No. 167 will apply also to the cases under consideration.

on 1070, § 1.⁶⁶ If such children were baptized by a fallen-away Catholic who was not a member of a non-Catholic sect, the presumption would favor Catholic Baptism until his intention to the contrary could be proved. If a non-Catholic minister (one who had never been a Catholic) intended to administer Catholic Baptism, the intention would be effective. The presumption, however, is against such an intention and it would have to be proved.

e. Adults and the Insane

172. If dying adults are baptized by a Catholic by virtue of canon 752, § 2, they are to be regarded as baptized in the Catholic Church and bound by canon 1070, § 1. If they are baptized conditionally by virtue of canon 752, § 3, and upon their recovery the doubt concerning the validity of their Baptism still remains, they are to be baptized conditionally.⁶⁷ If they have not received this second conditional Baptism (in the Catholic Church) and contract a marriage with the unbaptized, their marriage cannot be declared invalid.⁶⁸

173. Those insane from infancy are to be baptized as infants,⁶⁹ and the determination of the kind of Baptism they have received should follow the rules established for infants. If the insane, who have evinced their desire for Baptism in a lucid interval, are baptized by a Catholic, they will be baptized in the Catholic Church.⁷⁰ The Baptisms of the feeble-minded, who can distinguish right from wrong, follow the rules prescribed for adults. The Baptisms of those in a state of coma or delirium, when in danger of death, are to be judged as those of canon 754, §§ 3 (4).

§ III. "*Vel ad eandem ex haeresi aut schismate conversa*"

174. The same reasons that suggest a wider interpretation of the clause "*sectae haereticæ seu schismaticæ adscripta*" of

⁶⁶ S. C. de Prop. F., 1 Apr. 1922.—*NRT*, LII (1925), 497-498. In cases of this kind even the rights of infidel parents are not violated,—the natural cedes to the supernatural right. Cf. Benedictus XIV, ep. *Postremo mense*, 28 Feb. 1747, n. 16.—*Fontes*, n. 377; King, *op. cit.*, p. 36.

⁶⁷ Canon 752, § 3.

⁶⁸ Cf. canon 1070, § 2; No. 167, note 50.

⁶⁹ Canon 754, § 1.

⁷⁰ Cf. canon 754, § 3.

canon 1060 than strict heresy or schism⁴¹ will apply with equal cogency to the clause "*ex haeresi aut schismate conversa*" of canon 1070, § 1. Conversion to the Catholic Faith may be from schism, heresy, or any false religion, yet the baptism of the convert is supposed by the term "*conversion*". Conversion is a change from non-Catholic belief or infidelity to the Catholic Faith. In the case of those who enjoy the use of reason, it is a personal and volitional act, i. e., a free act performed by the person himself, and not passively through the will of another.

A. ADULTS

175. Normally, a conversion takes place after due instructions in the mysteries of Faith, whereupon the following order of procedure is observed: 1) If the Baptism is conferred absolutely, no abjuration of heresy or absolution from censures is required since the Sacrament of Regeneration wipes out all. 2) If Baptism is to be repeated conditionally the following order is to be observed:⁴²

a) The abjuration or profession of faith.

b) Conditional Baptism.

c) Sacramental confession with conditional absolution.⁴³

If adults are received into the Church in the manner thus prescribed they are undoubtedly to be regarded as converts to the Catholic Church.⁴⁴

⁴¹ Creusen ("*L'empêchement de disparité de culte*",—*NRT*, LII [1925], 496) accepts this wider meaning by including conversions from schism, heresy, and infidelity, i. e., Judaism, paganism, or the religion of the Mohammedans. See No. 131, note 14.

⁴² In both the first and second hypothesis the person so converted will be bound by the impediment of Disparity of Cult through the reception of Baptism in the Catholic Church. By virtue of an Indult granted to the Archbishop of Philadelphia January 4, 1914, and later to Cardinal Gibbons, a short formula for the conditional Baptism of adult converts was permitted in the Provinces of Philadelphia and Baltimore. Cf. *The Priest's New Ritual*, (compiled by Rev. Paul Griffith), 4 ed., Baltimore, 1914, p. 58-58b.

⁴³ This order of procedure is contained in *The Priest's New Ritual*, p. 46-56, and also in the Appendix for the United States inserted in the *Rituale Romanum*, p. 1-2. It was prescribed by an instruction of the Holy Office sent to the Bishop of Philadelphia on July 20, 1859,—*Fontes*, n. 953. Vide etiam S. C. S. Off., 20 Nov. 1878,—*Fontes*, n. 1058; 8 Mart. 1882,—*Fontes*, n. 1073.

⁴⁴ Cf. Petrovits, *New Church Law on Matrimony*, n. 224.

B. *Impuberes*

176. According to the rule of Cardinal Albitius, those validly baptized converts who enjoyed the use of reason but who had not yet completed their fourteenth year were required to make only the profession of faith.⁶⁶ The New Ritual prescribes the manner of procedure required in the law before the Code only in the supplement that is added for the United States. In the Ritual itself there is no reference to a manner of procedure.⁶⁷ The omission does not necessarily abrogate the former discipline but some doubt might readily be entertained with regard to the binding force of the particular mode in which this reconciliation is to take place.⁶⁸ It would be rash to say that the Church would recognize no conversion of a minor or an adult unless a formal abjuration or profession were made. If, in addition, the absolution from censure (apparently necessary only for those above the age of 14) were given in the internal, sacramental forum, what criterion is left in the external forum whereby the fact of conversion may be judged? It appears that the reception of the sacraments would serve as a sufficient evidence in the absence of the formal abjuration of heresy, the profession of faith, and the absolution from censure in the external forum.

⁶⁶ Cf. *De Inconstantia in Fide*, Cap. XIV, n. 58; *Fontes*, IV, p. 389, not. 2; S. C. S. Off., litt., 8 Mart. 1882,—*Fontes*, n. 1073; Vermeersch, *De Forma Spons. ac Matr. post Decretum "Ne Temere"*, n. 87; Cronin, *The New Matrimonial Legislation*, p. 279. The Code likewise excuses "*impuberes*" from punishments incurred *latae sententiae*. Cf. canons 2230; 2204. For the definition of "*impuberes*" and "*minores*" see canon 88, §§ 2-3. It seems to be a probable opinion, based at least on external authority, that the age of 14 is to be the norm for both sexes. Cf. Cappello, *De Censuris*, n. 17, 4; Sole, *De Delictis et Poenis*, n. 120, cum not. 1, 3; Vermeersch-Creusen, *Epitome*, III, n. 424; Cocchi, *Comment.*, Vol. 8, n. 44. Cheloci (*Ius Poenale*, p. 12, not. 1), Eichmann (*Das Strafrecht des C. I. C.*, p. 65-66, and Blat (*Comment.*, Vol. V, n. 50) employ the distinction in canon 88, § 2 and aver that girls at the completion of the age of twelve are subject to penalties incurred *latae sententiae*.

⁶⁷ The *Rituale Romanum* (Tit. II, cap. III, n. 12) prescribes only the following norm: "*Haeretici vero ad Catholicam Ecclesiam venientes, in quorum Baptismo debita forma, aut materia servata non est, rite baptizandi sunt; sed prius errorum suorum pravitatem agnoscant et detestentur, et in fide Catholica diligenter instruantur; ubi vero debita forma et materia servata est, omnia tantum suppleantur, nisi rationabili de causa aliter loci Ordinario videatur.*" Here there is no mention of the procedure demanded in the instruction of the Holy Office of July 20, 1859 (*Fontes*, n. 953).

⁶⁸ Cf. *AER*, LI (1914), 86-88.

C. INFANTS

177. A division of opinion exists among the authors regarding the status of infants, validly baptized in a non-Catholic sect, whose parents become converts to the Catholic Church. Some are inclined to believe that children in the age of infancy become converts to the Catholic Church by the very conversion of their parents.⁶⁶ This opinion is opposed by some, either on the ground that the act is not personal,⁶⁷ or that it is not external.⁶⁸ Others turn to Catholic education as a solution of the question and regard those children converts, who, having been validly baptized in heresy, are subsequently (on the acquisition of the use of reason) educated in the Catholic faith.⁶⁹

178. Though apparently sponsored by fewer authors, the opinion that baptized infants become converts to the Church upon the conversion of their parents seems to enjoy a greater intrinsic probability.⁷⁰ It is admitted even by the authors who deny this opinion that parents are competent to determine the intention of their infant children,—some even extend it to the early age of reason. Vermeersch, however, seems to limit this competence to the determination of the intention for Baptism: "*Dum baptismus recipitur etiam sine propria voluntate, in infantia, conversio dicitur actum personalem. Quare, non ipsa parentum conversione conversi putandi sunt etiam filii, sed*

⁶⁶ Wernz, *Ius Decret.*, IV, Pars I, p. 306; Petrovits, *New Church Law on Matrimony*, n. 228; Augustine, *Commentary*, V, p. 299.

⁶⁷ Vermeersch, *De Forma Spons. ac Matr. post Decretum "Ne Temere"*, n. 87.

⁶⁸ "The parents' own reception into the Church does not *ipso facto* make their children Catholics, nor is the desire or intention of the parents sufficient to do so. Some external act is necessary to make one a member of the body of the Church."—Cronin, *The New Matrimonial Legislation*, p. 280.

⁶⁹ Vermeersch-Creusen, *Epitome*, II, n. 344; Chelodi, *Ius Matr.*, n. 138; Vlaming, *Prael. Iuris. Matr.*, n. 598b; Wernz-Vidal, *Ius Canonicum*, V, n. 551; Farrugia, *De Matr.*, n. 238.

⁷⁰ Augustine (*Commentary*, V, p. 300) draws an argument from an affirmative answer given by the Congregation of the Council to the following *dubium*: "Num in Imperio Germaniae catholici, quid ad sectam haeticam vel schismaticam transierunt, vel conversi ad fidem catholicam ab ea postea defecerunt, eitam in iuvenili vel INFANTILI aetate, ad valide cum persona catholica contrahendum adhibere debeant formam in decreto Ne Temere statutam . . ."—S. C. Conc. 1 Feb. 1907, ad V,—ASS, XLI (1908), 108, 110. In the *dubium* both conversion and defection in the age of infancy are considered. The point raised by Augustine is, therefore, well taken.

oportet ut ipsi actu satis personali, fidem catholicam sint amplexi."⁷³ He seeks confirmation in the decree of the Holy Office of 'March 8, 1882,' which approves the rule established by Cardinal Albitius.⁷⁴ But the Cardinal's rule does not appear to treat of infants, but rather of those who have already arrived at the use of reason. It may well be admitted that a personal act is required for conversion after the use of reason,—it does not follow, however, that conversion before the use of reason is impossible on the ground that the act is not personal. Why cannot the parents interpret the intention of the infant for conversion as well as for Baptism?

179. Cronin, in postulating the insufficiency of the parents' intention to procure the conversion of the infant,⁷⁵ has recourse to the act of supplying the Catholic ceremonies of Baptism in cases where the validity of the infant's non-Catholic Baptism is established.⁷⁶ While it appears that such ceremonies may and ordinarily should be supplied,⁷⁷ the *strict obligation* to supply them is not so evident. When Cronin quotes the decision of April 2, 1879, he omits the third question asked, and the answer,⁷⁸ which, however, renders the absolute *obligatory* nature of the supplying of the ceremonies in the connection he demands, rather questionable. It may readily be admitted with Cronin that if the ceremonies of Baptism are supplied, the infant is to be considered a convert. The admission, however, militates against Vermeersch's opinion that the act of conversion cannot be ascribed to an infant since it is not personal.

⁷³ *De Forma Spons. ac Matr. post Decretum "Ne Temere"*, n. 87.

⁷⁴ *Fontes*, n. 1073.

⁷⁵ *De Inconstantia in Fide*, Cap XIV, n. 58 (quoted also in *Fontes*, IV, p. 389, not. 2.)

⁷⁶ See No. 177, note 70.

⁷⁷ *The New Matrimonial Legislation*, p. 282-283.

⁷⁸ S. C. S. Off. (Nottingham.), 2 Apr. 1879,—*Fontes*, n. 1061; *Suffragia super Decreto S. Rit. Cong.*, n. 2743,—*Decreta Authentica Congregationis Sacrorum Ritum*, Romae, 1897-1912, Vol. IV (1900), p. 353. *Vide etiam Rituale Romanum*, Tit. II, cap. III, n. 12.

⁷⁹ 3. "Quatenus affirmative, quid faciendum de permultis huiusmodi qui fere passim iam per multos annos in pueritia sub conditione sine caeremoniis iam baptizati sunt?" R. "Dissimulandum; quod si quis petat remittitur prudenti arbitrio R. P. D. Ordinarii."—*Fontes*, n. 1061. The whole decree, moreover, concerns conditional Baptism.

180. On the other hand, Cronin's demand of an external act seems to be satisfied by the conversion of the parents. The *external evidence* of the parents' conversion implies (if it is not expressed) the parents' intention for the children in infancy. If the ceremonies of Baptism are not supplied, how long are the infant children to be regarded as non-Catholics? Vermeersch says that the reception of the sacraments by the child, especially of First Holy Communion, would render the child a convert. Cronin takes exception to this: "But surely this personal act will not be the reception of the Sacraments of Penance, Confirmation, Holy Eucharist, nor the living of the ordinary life of a Catholic child, for this shows that the child is already a Catholic fully and completely, like any other member of the Church. We must go further back for the act which formally made this child a Catholic; and it is the profession of faith made in his formal reception into the Church."²⁰ He then refers to the rule of Cardinal Albitus for confirmation.

181. Attention has already been directed to the fact that the rule apparently applies only to those who become converts after the age of reason,—it does not appear to demand a profession of faith of a child arriving at the use of reason whose parents had already become converts during the child's infancy. Indeed, it does not appear in any way illicit to admit a child (after proper instruction) in such circumstances to the sacraments without exacting the formal profession of faith. The child is already a Catholic by the conversion of its parents.

182. What if only one of the parents becomes a convert? Even in this case infant children may, perhaps, be regarded as converts. The duties undertaken in conversion imply the Catholic education of the children, and the expressed or interpretative intention of complying with this obligation is sufficient to constitute infants as converts. The right of the convert parent is further a natural and a divine right which is above the right of opposition of the other parent. Infant children who cannot express their intention may perhaps have this intention supplied by the parent who has the right and obligation of direct-

²⁰ *The New Matrimonial Legislation*, p. 278.

ing it. Admittedly such cases would present serious difficulties, and the opinion is defended with due hesitancy.

183. If, on the other hand, infants on arriving at the use of reason must first receive a Catholic education before they will be regarded as converts,—how much education, it may be asked, is required to constitute evidence of conversion? At what period of Catholic instruction will the child become a Catholic? It appears intrinsically more probable, therefore, to maintain that baptized infant children become converts *ipso facto* upon the conversion of both parents, and perhaps of even one parent.²¹

184. By way of summary with regard to the conversion of children, the following may without hesitation be regarded as converts: 1) baptized infants who, at the will of one or both convert parents, have been received into the Church through the supplying of the Catholic ceremonies of Baptism; 2) children, who, enjoying the use of reason, have received any of the sacraments, or who have made a formal profession of faith with the motive of entering the Church. While, indeed, the opinion is defended which maintains that infant children become converts by the conversion of one or both parents,—a serious doubt obviously remains as to the positive will of the Church. The authors themselves disagree on the issue. Marriage cases involving the diriment impediment of Disparity of Cult, where no further evidence exists for the conversion of the baptized party, are to be sent to the Holy Office for solution. The question could become practical only after the marriage had already been contracted.

²¹ Catholic parents who would knowingly dare to present their children to non-Catholic ministers for Baptism, would incur excommunication. Cf. canon 2319, § 1, n. 3. Such children in infancy who at the time of the reconciliation of their parents still remained in their custody, would seem to become converts by the very fact of their parents' reconciliation. The conditions of reconciliation would demand this duty, and the implied or expressed acquiescence to the obligation would be sufficient to constitute the infant children as converts. The same may, perhaps, be said of the reconciliation of one parent. If, on the other hand, the presentation for Baptism to a non-Catholic minister were made in ignorance or good faith, the censure would not be incurred. This would imply that the Baptism itself is to be regarded as Baptism in the Catholic Church.

CHAPTER X

DOUBTFUL BAPTISM

ART. I. MATTER AND FORM

Fundamental to the validity of Baptism is the adherence to the required matter and form of the sacrament, and the necessary intention of the minister of the sacrament.

185. The great scholastics, followed thereafter by all theologians, distinguished the matter of Baptism into remote and proximate.¹ Natural water is the remote matter prescribed by Christ Himself: "Unless a man be born again of *water* and the Holy Ghost, he cannot enter into the kingdom of God."² The proximate matter of Baptism is the washing or the ablution. For validity, it may be either by infusion, immersion or aspersion.³ The essential element seems to be the ablution,⁴ which takes place on the flowing of water upon the skin of the head of the person to be baptized. The form of the sacrament necessary for validity is the expression of the baptismal action in the name of the Three Divine Persons: "*Ego te baptizo in nomine Patris, et Filii, et Spiritus Sancti.*" A moral unity must, moreover, exist between the ablution and the form.

186. Since these elements are essential, the omission of any one of them will render the Baptism invalid. Doubt of the validity of a Baptism may, therefore, arise with regard to the matter and form of Baptism. But in addition there is required

¹ Cf. S. C. de Prop. F., instr. (ad Vic. Ap. Siam), 23 Jun. 1830,—*Coll.*, n. 814.

² John, III, 5. The Council of Trent (sess. VII, *de baptismo*, can. 2) gave the following definition: "Si quis dixerit, aquam veram et naturalem non esse de necessitate baptismi, atque ideo verba illa Domini nostri Iesu Christi: '*Nisi quis renatus fuerit ex aqua et Spiritu Sancto*' ad metaphoram aliquam detorserit: A. S."—Denz., n. 858. Vide *CIC*, canon 737, § 1.

³ *CIC*, canon 758.

⁴ On the 14th of December 1898 the Holy Office ordered the conditional repetition of a Baptism that had been conferred by an unction instead of an ablution.—*Fontes*, n. 1211.

the intention of the minister.⁵ On this score in particular, recent discussions have arisen, especially with regard to the intention of ministers of certain non-Catholic sects.⁶ In order to understand the mind of the Church on this issue, it may be to advantage to review briefly the historical controversies pertaining to the intention of the minister.

ART. II. THE INTENTION OF THE MINISTER

187. Beginning in the early centuries of Christianity, the problem of determining the validity of Baptism has engaged the mind of the Church, and of theologians and canonists. It has existed particularly with regard to Baptisms administered outside of the Catholic Church. Indeed, St. Cyprian was so swayed by the conviction that Baptism could not be administered validly outside of the Catholic Church that he vigorously defended the practice, adhered to in Northern Africa, of baptizing all who had been baptized by heretics. Starting with the principle that Christ established one Church and one Baptism, he was convinced that a Baptism conferred by a counterfeit church, an heretical sect, was nothing short of a forgery of the true Baptism. He reasoned, moreover, that no Baptism was efficacious without the Holy Ghost, and since the Holy Ghost dwells only in the Catholic Church, true Baptism must likewise belong to the Catholic Church alone.⁷

The Donatists carried St. Cyprian's argument to its logical conclusion and declared invalid not only a Baptism conferred by a heretic, but also that administered by anyone who had lost the Holy Ghost through sin. In combating their error, St. Augustine showed that the validity of Baptism did not depend on the dispositions of the minister; that Baptism was a means of grace objectively efficacious; that as long as the Christian⁸

⁵ Cf. Conc. Trident., sess. VII, *de sacramentis in genere*, can 11.—Denz., n. 854.

⁶ Cf. AER, LXXIV (1926), 158-180; LXXV (1926), 136-151; 358-370; LXXVI (1927), 155-165; 496-504; *Gregorianum*, VIII (1927), 41-54.

⁷ Cf. Corblet, *Histoire du sacrement de Baptême*, I, 328-333.

⁸ From the ninth century on, it was generally admitted that Baptism conferred by anyone, whether baptized or unbaptized, using the essential rite, was valid. Cf. Labauche, *The Three Sacraments of Initiation*, p. 75-76; Nicolaus I (ad consulta Bulgarorum), Nov. 866,—Denz., n. 335. The question

administered the ablution and pronounced the Trinitarian form, the Baptism was valid.*

At Rome, the practice of the Church conformed to its teaching that the efficacy of Baptism should be attributed especially to the Trinitarian invocation which accompanied the ablution, since Christ so wished it when He instituted the sacrament of Baptism and established its rite.¹⁰

188. It was no far step from the discussion regarding the dispositions or moral qualifications of the minister to that of his intention. St. Augustine was the first to turn to the question and he considered two cases, namely, "the fallacious administration of Baptism (either where the subject alone acts, 'fallaciously', or where he acts in concert with the minister) performed either in the Catholic Church or in an heretical sect, supposed in good faith to be the true Church; and Baptism conferred for the mere purpose of amusement . . ."¹¹ By a fallacious administration of Baptism he understood that which would take place upon the minister performing seriously all the sacred rites and the subject receiving them in the same manner, though both intend to act only in pretension.¹² For St. Augustine, the internal intention of deception did not apparently constitute an obstacle to the validity of the sacrament.¹³ On the other hand, he would not commit himself upon the validity of a Baptism conferred in mockery or amusement.¹⁴

was no longer a matter of discussion after the thirteenth century, for the Church herself defined that Baptism could be administered validly outside of the Church. Cf. Conc. Lateran. IV, Cap. I *De fide catholica*.—Denz., n. 430: Eugenius IV (in Conc. Florentin.), const. *Exultate Deo*, 22 Nov. 1439 § 10.—*Fontes*, n. 52; Conc. Trident., sess. VII, *de baptismo*, can. 4.—Denz., n. 860.

* " . . . iam satis ostendimus ad Baptismum qui verbis evangelicis consecratur, non pertinere cuiusquam vel dantis vel accipientis errorem, sive de Patre, sive de Filio, sive de Spiritu sancto aliter sentiat, quam coelestis doctrina insinuat."—*De Baptismo contra Donatistas*, Lib. IV, cap. XV, n. 22.—*MPL*, XLIII, 168.

¹⁰ Cf. Labauche, *op. cit.*, p. 72-73. Vide etiam index systematicus, verbum, "Baptismus" apud Denz., p. [30].

¹¹ Pourrat, *Theology of the Sacraments*, p. 363.

¹² Pourrat, *op. cit.*, p. 366.
cit., p. 367. See No. 190.

¹³ The opinion of St. Augustine (taken in its proper context) must not be confused with the opinion later defended by Catharinus. Cf. Pourrat, *op.*

¹⁴ Cf. Pourrat, *op. cit.*, p. 368.

The discussion was again resumed in the twelfth century. According to some, no intention was required in the minister,—it sufficed that the rite be performed according to the prescriptions of the Church.¹⁵ Others again, among them Hugh of St. Victor and Peter Lombard, demanded the intention of conferring a sacrament.¹⁶

189. The great scholastics of the Middle Ages approached the final solution. They taught that the minister of Baptism is the rational instrument of Christ and the Church. He must, therefore, have the intention to do what they do.¹⁷ But a difficulty still remained to be solved. If the intention, which is mental and hidden, be demanded for the validity of Baptism, in what might the faithful place their assurance that the intention was present in the minister? St. Thomas ventured the following solution: "*minister sacramenti agit in persona totius Ecclesiae, cuius est minister; in verba autem, quae profert, exprimitur intentio Ecclesiae; quae sufficit ad perfectionem sacramenti nisi contrarium exterius exprimitur ex parte ministri, vel recipientis sacramentum.*"¹⁸

190. In the sixteenth century Catharinus, a Dominican theologian, arguing from the teaching of St. Thomas and other sources,¹⁹ distinguished between an external and an internal intention of administering Baptism. According to Catharinus the external intention of doing what the Church does was present when the minister intended the correct administration of the sacramental rite, though inwardly he would have a positive

¹⁵ Pourrat (*op. cit.*, p. 372) gives a quotation from Roland who defended this opinion. Vide etiam *op. cit.*, p. 374-375.

¹⁶ Cf. Petrus Lombardus, *Sent.*, Lib. IV, Dist. VI, cap. V. With regard to marriage, however, he appears to depart somewhat from his teaching concerning the necessity of the intention. "*Si autem verbis explicatur quod tamen corde non volunt, si non sit ibi coactio vel dolus, obligatio illa verborum, quibus consentiunt dicentes; Accipio te in virum, et ego te uxorem, matrimonium facit.*"—*Sent.*, Lib. IV, Dist. XXVII, cap. III.

¹⁷ William of Auxerre (1223) was the first to use the formula that was to express the teaching of the Council of Trent: "*intentio faciendi quod facit Ecclesia.*" The quotation is cited by Pourrat, *Theology of the Sacraments*, p. 376, ". . . et ideo requiritur eius intentio qua se subiciat principali agenti, ut scilicet intendat facere, quod facit Christus et Ecclesia."—Thomas Aq., *Summa Theol.*, IIIa, q. 64, art. 8, ad 1.

¹⁸ *Summa Theol.*, IIIa, q. 64, art. 8, ad 2.

¹⁹ Cf. Pourrat, *op. cit.*, p. 388.

intention of not conferring the sacrament. In his opinion the exterior intention as it manifested itself in the observance of the baptismal rite was sufficient for the validity of the sacrament. Opposed to this opinion were those who taught that the interior intention was likewise required for validity. This teaching ultimately prevailed, especially after the condemnation of a thesis defended by Francis Farvacques: "*Valet baptismus collatus a ministro, qui omnem ritum externum formamque baptizandi observat, intus vero in corde suo apud se resolvit: Non intendo, quod facit Ecclesia.*"²⁰ The opinion of Catharinus, though not thereby directly condemned, did fall into discredit.²¹

The controversies among the theologians did not serve to give a satisfactory answer whereby the presence of the internal intention of the minister could be determined. To allay all disquietude and anxiety in this regard, the Church herself enunciated the principle that the intention of the minister was to be presumed if evidence was at hand of the proper administration of the matter and form of the sacrament.²²

ART. III. THE VALIDITY OF NON-CATHOLIC BAPTISMS

191. It is of some significance, indeed, that the principle thus stated was given primarily as an answer to questions related to the validity of non-Catholic Baptisms. The Church at the Council of Trent,²³ in requiring of the minister the intention of doing what the Church does, did not demand for validity that this intention should be expressed or determined,—it re-

²⁰ S. C. S. Off., decr., 7 Dec. 1690, n. 28.—*Fontes*, n. 760.

²¹ Cf. Benedictus XIV, *De Synodo Dioec.*, Lib. VII, cap. IV, n. 8.

²² "In illa vero disquisitione facienda de validitate prioris baptismatis, antequam sub conditionata forma iteretur, debent animarum pastores inquirere præsertim super formam et materiam adhibitam in priore baptismo. Nam relate ad intentionem quæ, ex superius expositis, necessaria est ad valorem baptismi, nisi prudens de ea fuerit dubitatio, PRÆSUMENDA ILLA EST, ut recte observavit Cardinalis Petra: *Si materiam et formam adhibeant, præsumendum est habere intentionem baptizandi, alias non baptizarent; quod etiam satis est ut baptismus collatus a calvinistis sit validum, quamvis ipsi nullam efficaciam Baptismo tribuant.*"—S. C. de Prop. F., instr. (ad Vic. Ap. Siam), 23 Jun. 1830,—*Coll.*, n. 814. Cf. Petra, *Comment. ad Const. Apost.*, Const. II Gregorii XI, nn. 9-10.

²³ Sess. VII, *de sacramentis in genere*, can. 11.—*Denz.*, n. 854.

quired only the general intention of doing what the Church does, what Christ instituted, or what Christians do.*

192. Cardinal Bellarmine, whose teaching regarding the required intention for Baptism has on several occasions been quoted with approval by the Church,²⁸ clearly points out that it is not necessary to intend what the Roman Church does, but that it is sufficient to intend what Christ instituted, or what Christians do. Even the intention to do what the sect does, is sufficient to constitute a general intention of doing what the universal Church does.²⁹ Nor does the Council of Trent³⁰ require the intention of doing what the Church *intends*,³¹—it

* "Ad valorem tamen Sacramenti necessariam non esse eam intentionem quam vocant expressam seu determinatam, sed sufficere intentionem tantum genericam nimirum *faciendi quod facit Ecclesia seu faciendi quod Christus instituit vel quod christiani faciunt*, theologi passim docent. 'Ad valorem Sacramenti, ait P. Antoine, *de Sacr. in gen.*, Cap. II, non requiritur expressa, et distincta intentio faciendi Sacramentum, sed sufficit confusa et implicita, qua quis intendat facere id quod facit Ecclesia Christi, aut quod Christus instituit, aut quod vidit per parochum fieri, aut quod christiani faciunt. Constat ex praxi Ecclesiae, quae non rebaptizat eos qui baptizati sunt ab imperitis et rudibus, aut paganis, cum debita materia et forma, licet illi non noverint distincte quid sit Baptismus, aut Sacramentum. Praeterea tunc est intentio faciendi quod facit Ecclesia, quam solam requirunt. Concilium Florentinum et Tridentinum.'—S. C. S. Off., instr. (ad Custodem Terrae Sanctae), 30 Jan. 1833.—*Fontes*, n. 871. Cf. Bellarminus, Lib. I *de Sacram. in genere*, cap. XXVII.—*Op. Omnia*, Tom. III, 413.

²⁸ Cf. S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872.—*Fontes*, n. 1024; instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050.

²⁹ "Petes, quid si quis intendat facere, quod facit Ecclesia aliqua particularis, et falsa, quam ipse putat veram, ut Genevensis, et intendat non facere, quod facit Ecclesia Romana? Respondeo, etiam id sufficere. Nam qui intendit facere, quod facit Ecclesia Genevensis, intendit facere, quod facit Ecclesia universalis. Ideo enim ille intendit facere, quod facit talis Ecclesia, qua putat illam esse membrum Ecclesiae verae universalis; licet fallatur in cognitione verae Ecclesiae. Non autem tollit efficaciam Sacramenti error ministri circa Ecclesiam, sed defectus intentionis. Atque hinc est quod in Ecclesia Catholica non rebaptizantur baptizati a Genevensibus [but see Corblet, *Histoire du sacrement de Baptême*, I, 350-351.], qui tamen dum baptizant, intendunt facere quod facit Ecclesia Genevensis, et non quod facit Ecclesia Romana."—Lib. I *de Sacram. in genere*, cap. XXVII.—*Op. Omnia*, Tom. III, 413.

³⁰ Sess. VII, *de baptismo*, can. 4.—Denz., n. 860.

³¹ "... Concilium enim in toto can. 11 [sess. VII, *de sacram. in genere*,—Denz., n. 854] non nominat finem Sacramenti, neque dicit Concilium, ut illi [Tilmanus et Kemitius] videntur accepisse, oportere ministrum intendere id facere, quod Ecclesia intendit, set quod Ecclesia facit. Porro, quod Ecclesia facit, non finem, sed actionem significat. Denique ex praxi id constat. Nam neque vetus Ecclesia rebaptizabat baptizatos parvulos a Pelagianis, neque nos rebaptizamus baptizatos a Zwinglianis et Calvinistis, et tamen scimus omnes istos baptizare sine intentione veri finis, qui est tollere peccatum

requires for validity only that intention of doing what the Church *does*. Errors, therefore, concerning the nature of Baptism, or of its efficacy, are not incompatible with the intention of doing what the Church *does*.²⁹ Even the express mention of the minister to the candidate that the rite will have no effect whatever on the soul, does not *per se* vitiate the validity of the intention.³⁰ The primary concern of the Church is centered upon

originale."—Bellarminus, *loc. cit.* Cf. Benedictus XIV, *De Synodo Dioec.*, Lib. VII, cap. VI, n. 9; S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872,—*Fontes*, n. 1024; instr. (ad Ep. Nesquallien.), 24 Jan. 1877,—*Fontes*, n. 1050.

²⁹ "Itaque circa Baptismum a ministris sectae methodistarum administratum refert, tot et tales esse horum haeticorum errores circa necessitatem virtutem et efficaciam eiusmodi sacramenti, ut pro certo retineri debeat eos illum habere tamquam ritum mere indifferentem, quem ideo in praeteritis temporibus penitus omittere conseruerunt, et in posterioribus reassumpserunt sola prava voluntate homines infideles, vel etiam fideles fallendi, iisdem scilicet ostendendi falsam eorum religionem a nostra unice vera non differre . . . Etenim novit A. Tua dogma fidei esse Baptismum a quocumque sive schismatico, sive haeretico, sive etiam infideli administratum validum esse habendum, dummodo in eiusdem administratione singula concurrerint, quibus sacramentum perficitur, scilicet debita materia, praescripta forma, et persona ministri cum intentione faciendi quod facit Ecclesia. Hinc consequitur errores peculiare, quos ministrantes sive privatim, sive etiam publice profitentur nihil officere posse validitati baptismi, vel cuiuscumque sacramenti, quia ut loquitur S. Augustinus, sacramenta ubique integra sunt, etiamsi prave intelligantur, et discordiose tractentur (*S. August., de Bapt., lib. 3, cap. 15, N. 20*). Imo, quod praesertim in casu de quo agitur notandum est, peculiare errores ministrantium, per se et propria ratione, neque excludunt illam intentionem, quam minister sacramentorum debet habere, faciendi nempe quod facit Ecclesia . . . Videt igitur A. Tua quomodo in Ecclesia semper traditum inveniatur, errores quos haeretici sive privatim, sive etiam publice profitentur, non esse impossibiles cum illa intentione, quam sacramentorum ministri de necessitate eorumdem tenentur habere, faciendi nempe quod facit Ecclesia, vel faciendi quod Christus voluit ut fieret; et eosdem errores per se non posse inducere generalem praesumptionem contra validitatem sacramentorum in genere, et Baptismi in specie ita ut ea ipsa sola statui possit practicum principium omnibus casibus applicandum, vi cuius quasi a priori, ut aiunt, baptismus sit iterum conferendus."—S. C. S. Off., instr. (ad Ep. Nesquallien.), 24 Jan. 1877,—*Fontes*, n. 1050. Vide etiam S. C. S. Off., instr. (ad Custodem Terrae Sanctae), 30 Jan. 1833,—*Fontes*, n. 871; instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872,—*Fontes*, n. 1024; S. C. de Prop. F., instr. (ad Vic. Ap. Siam), 23 Jun. 1830,—*Coll.*, n. 814; instr. (ad Vic. Ap. Pondicher.), 26 Jul. 1845,—*Coll.*, n. 999; Benedictus XIV, *De Synodo Dioec.*, Lib. VII, cap. VI, n. 9.

³⁰ "Denique A. Tua quantum adiecit classem dubiorum circa baptismum, quae haec fuere: *In quibusdam locis nonnulli (haeretici) baptizant cum materia et forma debitis, simultanee applicatis, sed expresse monent baptizandos, ne credant baptismum habere ullum effectum in animo: dicunt enim ipsum esse signum mere externum aggregationis illorum sectae. Itaque illi saepe catholicos in derisum vertunt circa eorum fidem de effectibus baptismi, quam vocant quidem superstitiosam. Quaeritur: 1. Utrum baptismus ab illis haeticis administratus sit dubius propter defectum intentionis faciendi quod*

the rite of Baptism, and when proof of its integrity is furnished, the intention is to be presumed. Since the intention is of its nature internal and hidden, the rule established by the Church is the only possible solution of avoiding constant anxieties and scruples.⁵¹

At first sight, the instance that follows may, perhaps, appear as a contradiction to this rule of the Church, yet on careful analysis it will be found to offer even further confirmation.

193. A synod held in 1844 in the vicariate of Pondicheri (in India) enacted the following statute: "*Iuxta usum generatim exceptum, omnes pueri qui a pseudo-ministris protestantibus, quidquid de istorum dotibus et opinionibus praedicetur, baptizati sunt, sub conditione rebaptizandi sunt. Hoc ita statuitur, ex eo quod merito et multis dubitatur de fidei capitibus et praxi diversarum sectarum, quae ex reformatione prodierunt.*"⁵² The instruction of the Congregation of the Propaganda on turning to this statute of the synod approved it substantially but it did take exception on one score:

Baptizatos porro ab hodiernis haereticis, denuo a catholicis baptizari, non est imprudens nec insuetum, propter haereticorum incertam et suspectam praxim; NON TAMEN EO NOMINE QUOD DUBITATUR DE FIDEI BAPTIZANTIUM CAPITIBUS. Etenim si certo constaret praedictos haereticos legitimam adhibuisse formam, materiam atque

voluit Christus, si expresse declaratum fuerit a ministro, antequam baptizet, baptismum nullum habere effectum in animum. 2. Utrum dubius sit baptismus sic collatus, si praedicta declaratio non expresse facta fuerit immediate, antequam baptismus conferretur, sed illa saepe pronunciata fuerit a ministro, et illa doctrina aperte praedicetur in illa secta' . . . Itaque ad praefata dubia S. C. respondit: 'Ad primum, Negative: quia, non obstante errore quoad effectus baptismi, non excluditur intentio faciendi quod facit Ecclesia . . . Ad secundum, Provisum in primo.'—S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872,—*Fontes*, n. 1024.

⁵¹ "Hae autem cautela ac diligentiae omnes in ferendo iudicio de baptismo iam collato, de cuius validitate dubitatur, ut adhibeantur, tum Sacramenti eiusdem dignitas et sanctitas, tum fidelium utilitas, et animarum quies, atque tranquillitas cui in primis consulendum est, omnino suadent. Quandoquidem si nimia, seu imprudenti quadam facilitate, dubia quae circa huius Sacramenti validitatem in dies nascuntur excipiantur, homines timidi et scrupulosi de suscepti baptismi valore semper dubitabunt, seque iterum baptizari requirent. Horum exemplum alii atque alii imitabuntur, ideoque multa eaque gravia in religionem orirentur incommoda et scandala, quae omnino evitari debent."—S. C. S. Off., instr. (ad Custodem Terrae Sanctae), 30 Jan. 1833,—*Fontes*, n. 871.

⁵² Feije, *De Imped. et Dispens.*, n. 465.

intentionem, rebaptizare prorsus non liceret, ut omnes norunt, neque Synodi (Pondicheriensis) Patres certe ignoraverunt, qui illis decreti sui verbis aliud fortasse designant, quam hodiernos haereticos, socinianos, methodistas, quakeros, et forte alios, qui cum Baptismi necessitatem negant, ritum fere contemnunt, idcirco baptizare recte nullo modo creduntur.⁸²

194. The line of reasoning and the points emphasized in the answer are deserving of close attention. Though the Congregation did not disapprove of the practice of baptizing conditionally those baptized by the heretics of that time, it did call attention to an error in the statute. The synod had justified its enactment on the basis of two leading reasons: "*ex eo quod merito et multis rationibus dubitatur de fidei capitibus ET praxi diversarum sectarum.*" The Congregation rejected the first, but admitted the second, namely, the suspected practice. Again, when the Congregation named the Socinians, the Methodists, and the Quakers as sects whose Baptisms could be suspected, it admitted the suspicion on the ground that these sects, in denying the necessity of Baptism, usually rejected the rite,—"*idcirco baptizare recte nullo modo creduntur.*"⁸³ The fundamental reason for suspicion alleged by the Congregation is, therefore, the suspected practice, the suspected rejection of the rite.

195. What, precisely, is meant by the clause "*cum Baptismi necessitatem negant*"? It cannot refer to a doctrinal error regarding the necessity of Baptism for salvation, nor to an error regarding the nature and efficacy of the sacrament. The Holy

⁸² Instr. S. C. de Prop. F., (ad Vic. Ap. Pondicher.), 26 Jul. 1845,—*Coll.*, n. 999.

⁸³ Pope Benedict XIV (*De Synodo Dioec.*, Lib. VII, cap. VI, n. 8) also mentions an instance of a just suspicion based on the corruption of the rite: "Rationabiliter porro Patribus Concilii Provincialis Mechliniensis anni 1606, incertum saltem, et dubium visum est Baptisma collatum ab haereticis Hollandiae, finitimarumque regionum, apud quos mos invaluerat, ut uno aquam fundente, alter Sacramenti formam pronunciaret; ac propterea iuste illud iterandum decrevere . . . cuius quidem Concilii sanctionem tuto sectari possunt et debent aliarum Ecclesiarum Praesules, a quibus sint Ecclesiae reconciliandi haeretici, iis in locis baptizati, ubi eundem erroneum Baptismi ritum plerumque adhiberi, non ex incerto rumore, sed ex fide dignis testimoniis acceperint, atque ideo merito suscipiuntur . . ." The complete quotation is cited also in S. C. de Prop. F., instr. (ad Vic. Ap. Siam), 23 Jun. 1830,—*Coll.*, n. 814. Vide etiam S. C. de Sacram., 17 Nov. 1916,—AAS, VII (1916), 478-480.

See has constantly insisted that doctrinal errors do not constitute a ground of presuming a Baptism as doubtful or invalid. The clause seems to refer rather to the rejection by certain sects of the rite of Baptism.²² Thus the Socinians and the Quakers have always repudiated Baptism and do not administer it.²³

196. With regard to the Methodists, the Bishop of Nesqually (Seattle) urged that the very fact of a *change* from the former practice did not remove the doubt: "*ut pro certo retineri debeat eos illum habere tamquam ritum mere indifferentem, quem ideo in praeteritis temporibus penitus omittere consueverunt, et in posterioribus reassumpserunt sola prava voluntate homines infideles, vel etiam fideles fallendi, iisdem scilicet ostendendi falsam eorum religionem a nostra unice vera non differre.*"²⁴ When the Holy See in the instruction of July 26, 1845, referred to the Baptisms of Methodists, it admitted the presumptive suspicion of a rejected rite or a suspected practice because at that time the Methodists *repudiated* Baptism. But in the instruction sent to the Bishop of Nesqually, the Holy See admitted no such presumption of suspicion for *de facto* they were again administering Baptism. Even the additional abuses

²² The presumption resting on the repudiation of Baptism by a sect in the instruction of July 26, 1845 must not be confused with the presumption in the decision of August 1, 1883 ([Savannah], ad II, "*Affirmative quoad primum*,"—*Fontes*, n. 1083). In the instruction of July 26, 1845, the presumption is that of doubtful Baptism on the supposition that some evidence exists for a Baptism having been conferred in a sect that rejects the rite itself. It is doubtful because of the suspected practice or rejected rite. The decision of August 1, 1883; "*Si pars vel partes acatholicae parentes habuerint ad sectam pertinentes quae Baptismum respuunt, hic non est praesumendus*", supposes the absence of any evidence for the fact of Baptism and admits the presumption of its absence in accordance with the actual and avowed policy of the sect. The difference of the evidence actually in possession of the one making the investigation, gives rise to the difference in the presumptions.

²³ "Qua super re A. Tua ante oculos habeat regulam generalem iam saepe traditam ab hac S. C. et praesertim in fer. IV, die 10 Martii 1824, quam in pluribus aliis casibus similibus confirmavit, quaeque est tenoris sequentis: 'Quoad venientes a sectis, ex. gr. *quakerorum*, quas notum est vel baptismum minime ministrare, vel. invalide conferre, ipsos, dum in sinu Ecclesiae recipiuntur, solemniter baptizandos esse . . .'"—S. C. S. Off., instr. (ad Ep. Nesquallien.), 24 Ian. 1877,—*Fontes*, n. 1050. Cf. Perrone, *De Matr.*, Tom. II, cap. VII, art. 2. Perrone includes also the Mennonites and Swedenborgians.

²⁴ *Loc. cit.*

mentioned by the Bishop of Nesqually³⁸ were not admitted as existing presumptively, but required proof.³⁹

197. Only those Baptisms, therefore, which are conferred in those sects that repudiate Baptism are under an initial presumption of doubt. On the other hand, those sects which prescribe Baptism must first be examined with regard to their ritual before forming any presumption. If the ritual prescribes a valid matter and form, the initial presumption will be for the validity of the Baptism. If the rite prescribed is of doubtful validity or of manifest invalidity, the initial presumption will bear the corresponding character of doubt or of invalidity.

198. The term "initial presumption" is used advisedly, for the Church does not permit the investigation to stop with a presumption regarding a sect. Each individual case must be examined to determine the value of the initial presumption. The norm of investigation prescribed by the Holy Office in the instruction sent to the Bishop of Nesqually centered on two points: "1. *Utrum ritus administrandi sacramentum Baptismi, ab ista secta in istis regionibus retentus, aliquid contineat quod illius nullitatem inducere valeat.* 2. *Utrum talis sectae ministri de facto sese conforment praescriptionibus in propria eorum secta sancitis.*" The ritual of the sect together with the actual administration of the minister represents the extent of the investigation, though an inquiry should also concern the intention of the minister.⁴⁰ The Holy See has constantly insisted that each individual case must be examined.⁴¹

³⁸ See No. 192, note 29.

³⁹ "... probe intelliges quod si in hac materia possibilis foret quaedam generalis praesumptio in principium practicum convertenda, haec non quidem ex defectibus et abusibus ministrorum differentium sectarum esset derivanda, sed praesertim ex indole, natura et consuetudine actuali earumdem sectarum."—S. C. S. Off., instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050.

⁴⁰ S. C. S. Off. (Bulgariae), 5 Jul. 1853.—*Fontes*, n. 925. An investigation as to the intention of the minister may disclose a lack of the necessary intention or a positive indication of its doubtful validity. If no such evidence is brought to light, the intention of doing what the Church does, or what Christ instituted is presumed to exist provided that the required matter and form of the sacrament has been adhered to.

⁴¹ Cf. S. C. S. Off. (Bulgariae), 5 Jul. 1853.—*Fontes*, n. 925; litt. (ad Ep. Harlemen.), 6 Apr. 1859.—*Fontes*, n. 950; instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050; 20 Nov. 1878.—*Fontes*, n. 1058; 7 Jul. 1880, ad 6.—Gasparrri, *De Matr.*, n. 691; (ad Vic. Ap. Iaponiae

199. As a summary of the discussion of non-Catholic Baptisms, the following conclusions seem to be fully warranted. A Baptism bearing the initial presumption of validity must continue to be regarded as valid until a *positive* reason is found for regarding it as doubtful or invalid. If nothing positive is found to upset this presumption, the intention of doing what the Church does must be presumed. An initial presumption of doubt concerning a Baptism retains its character of doubt until a positive reason demands that it cede to the presumption of certain validity or invalidity. A Baptism bearing the initial presumption of invalidity cedes to the presumption of doubt or validity only on the ground of positive reasons.⁴ Those indivi-

Merid.), 4 Feb. 1891.—*Fontes*, n. 1130; 2 Aug. 1901.—*ASS*, XXXIV (1901-1902), 640; S. C. de Prop. F., instr. 17 Apr. 1777.—*Coll.*, n. 522; instr. (ad Vic. Ap. Myssur.), 31 Dec. 1851.—*Coll.*, n. 1069. The Church demands a thorough investigation also of the Baptisms of Catholics which have been conferred in extraordinary circumstances by others than her ordained ministers, or when a prudent doubt arises concerning the very fact of its administration. Cf. S. C. Conc. (Ripana), 12 Dec. 1733.—*Thes.*, VI, 178-180; (Tarvisina Baptismi), 28 Apr. 1736.—*Thes.*, VII, 210-213; 4 Maii 1737.—*Thes.*, VIII, 54-56; (Sutrina Baptismi), 12 Jul. 1794.—*Thes.*, LXIII, 165-171; (Brixien. Dubia Baptismi, et Matrimonii), 27 Aug. 1796.—*Thes.*, LXV, 209-220; 17 Dec. 1796.—*Thes.*, LXV, 296-297; (Brixien. Baptismi), 11 Feb. 1797.—*Thes.*, LXVI, 26-28; 16 Mart. 1897.—*Coll.*, n. 1962.

⁴ It is not the purpose of this study to determine the status of individual sects of today regarding the question of Baptism. For the benefit of the reader a few decisions relative to particular sects are cited. These decisions are of value *primarily* as confirmations and reiterations of principles. They offer no guarantee that the sects in question have remained the same with regard to their rituals or with regard to their rejection or requirement of Baptism. The investigation of the ritual of the sect of a locality must be made with reference to the one *in use at the time of the Baptism*. The following decrees may be consulted: ANGLICANS—S. C. S. Off., 20 Jul. 1840.—*NRT*, XV (1883), 401-402; (Bombaay), 21 Feb. 1883.—*Fontes*, n. 1078; CALVINISTS—S. C. de Prop. F., instr. (ad Vic. Ap. Siam), 23 Jun. 1830.—*Coll.*, n. 814; S. C. S. Off., instr. (ad Custodem Terrae Sanctae), 30 Jan. 1833.—*Fontes*, n. 871; instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872.—*Fontes*, n. 1024; instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050. LUTHERANS—S. C. S. Off. (Bulgariae), 5 Jul. 1853.—*Fontes*, n. 925. METHODISTS—S. C. de Prop. F., instr. (ad Vic. Ap. Pondicher.), 26 Jul. 1845.—*Coll.*, n. 999; S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872.—*Fontes*, n. 1024; instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050. QUAKERS—S. C. de Prop. F., instr. (ad Vic. Ap. Pondicher.), 26 Jul. 1845.—*Coll.*, n. 999; S. C. S. Off., instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050. SOCINIANS—S. C. de Prop. F., instr. (ad Vic. Ap. Pondicher.), 26 Jul. 1845.—*Coll.*, n. 999. UNITARIANS—S. C. S. Off. (Bulgariae), 5 Jul. 1853.—*Fontes*, n. 925. ZWINGLIANS—S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872.—*Fontes*, n. 1024; instr. (ad Ep. Nesquallien.), 24 Jan. 1877.—*Fontes*, n. 1050.

dual cases that bear some evidence for the fact of Baptism, but which for various reasons cannot be examined in the light of an initial presumption, must be judged according to the evidence afforded by the individual investigation. As long as evidence is wanting to produce moral certainty either of the fact of its administration, or of the use of a valid rite, this lack of evidence forms a positive reason for regarding the Baptism as doubtful.

200. Baptisms of uncertain validity must be investigated, whether it be with reference to the existence of Baptism as it is required by the divine law for salvation, or with reference to the necessity of a valid Baptism required by the ecclesiastical law for the validity of a sacramental marriage. Yet the demands of the divine law and of the law of the Church, especially with reference to doubtful Baptism, will not impose the same norms of procedure consequent upon the investigation. A doubtful Baptism that cannot be proved to be certainly invalid will, *per se*, suffice for marriage, but no such norm is permissible in dealing with the matter of salvation. Here the safer course *must* be followed by the administration of conditional Baptism.⁴⁴

ART. IV. PRE-CODE LEGISLATION WITH REFERENCE TO DOUBTFUL BAPTISM IN CONTRACTED MARRIAGES

201. In the law existing before the Code, a doubtful Baptism was presumed valid *in ordine ad validitatem matrimonii*. The principles in force were enunciated in a decision of the Holy Office of November 17, 1830⁴⁵:

⁴⁴ "Duo alia dubia versantur circa baptizatos, sive eorum baptismus sit validus, sive de eius valore iuste dubitaretur, et circa hos S. Sanctitas iussit imprimis Vicario Apostolico communicari Instructionem Emorum datam fer. IV. 17 Nov. 1830 [*Fontes*, n. 869], prout S. C. de facto transmittit. *Advertendum est tamen, quomodo baptismus in casibus in decreto expressis, validus censendus sit in ordine ad matrimonium, tamen partem conversam, de cuius baptismi valore prudenter dubitaretur, rebaptizandum fore sub conditione quia Baptismus est Sacramentum necessitatis.*"—S. C. S. Off., instr. (ad Vic. Ap. Oceaniae), 6 Apr. 1843.—*Fontes*, n. 894.

⁴⁵ *Fontes*, n. 869. Later decisions constantly referred to this decree as best expressive of the law in force. Cf. S. C. S. Off., 20 Dec. 1837.—*Acta et Decreta Conc. Balt. II* (1866), Appendix, n. XVI; 20 Jul 1840,—*NRT*, XV (1883), 401-402; 29 Apr. 1842, ad 2,—*Fontes*, n. 888; instr. (ad Vic. Ap. Oceaniae), 6 Apr. 1843,—*Fontes*, n. 894; 5 Feb. 1851,—Feije, *De Imped. et Dispens.*, n. 467; 7 Mart. 1862,—*NRT*, XXIV (1892), 496-

An degentes in iis protestantium locis, ubi baptisma dubium est, tamquam infideles habendi sint, ita ut inter catholicos et eos disparitatis cultus impedimentum dirimens adesse censeatur.

R. 1. Quoad haereticos quorum sectae ritualia praescribunt collationem Baptismi absque necessario usu materiae et formae essentialis, debet examinari casus particularis. 2. Quoad alios qui iuxta eorum rituale baptizant valide, validum censendum est Baptisma. Quod si dubium persistat, etiam in primo casu, censendum est validum Baptisma in ordine ad validitatem matrimonii. 3. Si autem certo cognoscatur nullum baptisma ex consuetudine actuali illius sectae, nullum est matrimonium.

The practical application of the principles will be sufficiently demonstrated by a brief discussion of the possible cases that could arise.

202. Since, in the law before the Code, the impediment of Disparity of Cult affected all the baptized (without distinction as to Catholic and non-Catholic), it will be evident that, on the score of this impediment, marriages of two baptized persons or of two unbaptized persons, were to be regarded as valid. Those marriages contracted between the certainly baptized and the certainly unbaptized were invalid on the ground of Disparity of Cult.* The rule that doubtful Baptism was to be presumed valid with reference to the validity of a marriage applied to the marriages of the doubtfully baptized with the unbaptized. Such marriages were regarded as invalid on the ground of Disparity of Cult.* In conformity with this prin-

497; instr. (ad Ep. Nesquallien.), 24 Jan. 1877,—*Fontes*, n. 1050; 3 Apr. 1878,—Aichner, *Compend. Juris Eccles.*, § 173, not. 4; 18 Sept. 1890,—*NRT*, XXIII (1891), 522-523; 3 Apr. 1893,—Blat, *Comment.*, Vol. III, P. I, n. 467.

* The certainty predicated of the validity or invalidity of Baptism is to be understood in the sense of moral certainty derived either from direct proof, or through the legitimate use of presumptions.

* S. C. S. Off., 20 Jul. 1840,—*NRT*, XV (1883), 401-402; 3 Apr. 1878,—Aichner, *Compend. Juris Eccles.*, § 173, not. 4; 7 Jul. 1880,—Gasparri, *De Matr.*, n. 691; (ad Vic. Ap. Iaponiae Merid.), 4 Feb. 1891.—*Fontes*, n. 1130. Arendt is of the opinion that the application of the principle did not rest on a mere *praesumptio iuris humani*, otherwise it would have been in flagrant opposition to the favor constantly extended to the validity of a marriage,—“Necessario igitur requirenda aliunde est ratio qua fundaretur illa praxis . . . Adverteram, nimirum, factum suscepti baptismi non fundare per impressum characterem, certam subiectionem legibus Ecclesiae, nisi, ut docet etiam S. Thomas, in quantum hic per signum sensi-

ciple of regarding doubtful Baptism⁴⁷ as valid in the matter of determining the validity of a marriage, it followed that the marriages of those doubtfully baptized with the certainly baptized or with the doubtfully baptized, were valid.

203. Cardinal Gasparri⁴⁸ went even further in his conclusions, defending the opinion that marriages which had been contracted between two certainly or doubtfully baptized persons would continue to remain valid even if it were later discovered that one of the parties was not baptized.⁴⁹ The principal grounds

bile innotescit. Iamvero Christus D., instituendo sacramenta quae consistant in actione ministri humana cum interna intentione debite posita, . . . contentus fuit illa certitudine morali, aut magna coniecturali probabilitate quae sufficit in ordinario consortio humano, ut tuto firmare nostram praxim possumus. Haec itaque, utut in se praesumptiva et probabilis tantum, non ex sola praesumptione iuris humani, sed ex praesumptione iuris de iure divino quoties in signo sacramentali exterius adest iuxta communiter contingentia, debet sufficere ad fundanda certam subiectionis obligationem."—*Jus Pont.*, V (1925), 136. Vide etiam NRT, LI (1924), 385-399; Lehmkuhl, *Theol. Mor.*, II, n. 322.

⁴⁷ The doubt could be one of law or fact: "*Utrum sive dubium sit iuris sive facti (scilicet de baptismo recepto) conclusiones debeant esse eadem respectu matrimonium? Resp.: praevisio diligenti examine in singulis casibus, et persistente adhuc dubio sive iuris, sive facti, eadem debent conclusiones respectu matrimonium.*"—S. C. S. Off., 7 Jul. 1880, ad 6.—Gasparri, *De Matr.*, n. 691. The explanatory clause "*scilicet de baptismo recepto*" appears to be an insertion made by Gasparri,—at least it is not clear that it existed in the *dubium* proposed. The same insertion in parentheses is given by Wernz, *Jus Decret.*, IV, n. 508, not. 33. The Holy See seems to have admitted the principle that a doubtful Baptism was to be presumed valid "*in ordine ad validitatem matrimonii*" only in those cases where moral certainty existed as to the administration of the rite of Baptism,—"*denique si post diligens et accuratum examen dubium de valide suscepto baptismate tolli nequeat, et constet de facto suscepti baptismatis, huiusmodi validum censendum esse in ordine ad validitatem matrimonii iuxta decretum d. 17 Nov. 1830.*"—S. C. S. Off., 3 Apr. 1878.—Aichner, *op. cit.*, § 173, not. 4. Vide etiam S. C. S. Off., 3 Apr. 1893.—Blat, *op. cit.*, Vol. III, P. I, n. 467. Moreover, the instruction sent by the Holy Office to the Bishop of Savannah (1 Aug. 1883, ad secundum partem, n. 5.—*Fontes*, n. 1083) did not admit the application of the principle in the case of an insoluble *dubium facti* of the administration of Baptism, but demanded that such cases with all their circumstances be sent to the Holy See. It appears, therefore, that the *dubium facti* mentioned in the decision of July 7, 1880 is not to be interpreted by what appears to be merely an explanatory note ("*scilicet de baptismo recepto*") inserted by Gasparri and Wernz, but is to be construed as concerning a *dubium facti* arising on some point in the administration of the rite. Doubts of this kind might arise on several grounds: e. g., with regard to the moral unity of the matter and form, or upon the external ministerial actions of the minister in reference to the *ablutio*.

⁴⁸ *De Matr.*, n. 689-691.

⁴⁹ The opinion was defended likewise by Konings-Putzer (*Comment. in Facult.*, p. 391-392) though in another instance he admits an objection

of his argument for the limitation of the impediment may be summarized as follows: 1) The custom introducing the impediment did not contemplate such cases. 2) In reference to a number of cases of doubtful Baptism, the Holy See replied that the Baptism was to be administered conditionally "*secreto, et sine praeiudicio validitatis matrimonii*."⁶⁰

Ex his clarum est matrimonium in casu valere non solum praesumptione fori externi, quatenus in dubio praesumitur baptismus rite datus, ideoque validum matrimonium, sed etiam in foro interno, licet reapse baptismus datus non sit, aut nulliter datus; secus S. C. respondere non potuisset baptismum esse conferendum sub conditione et secreto *sine praeiudicio validitatis matrimonii*, sed potius his casibus providendum foret per baptismi collationem sub conditione, et simul per consensus renovationem ad cautelam aut per sanationem in radice. Exinde sequitur matrimonium valere, etsi post matrimonium certitudo acquiratur de baptismi defectu in alterutra parte, valere, inquam, usque ab initio ita ut, baptismo absolute collato, consensus renovari non debeat.⁶¹

3) The Holy See seemed to appear altogether unwilling to grant the dispensation "*mixtae religionis et ad cautelam disparitatis cultus*."

204. With regard to the argument drawn from the historical foundation of the impediment, it may be said that the custom introducing the impediment in the twelfth century (which Cardinal Gasparri,⁶² in referring to the opinion of Cardinal Bellarmine, appears to accept as a probable date) did not, in all likelihood, contemplate such a case. The custom at this period represented, more or less, a popular reaction to all things alien to the Faith,—the diriment impediment affecting even the marriages of Catholics with heretics.⁶³ Yet, as early as the thir-

to it (*op. cit.*, p. 394). Wernz (*Ius Decret.*, IV, n. 507, not. 28) and Vlaming (*Prael. Iuris Matr.*, n. 291, not. 3) refer to Santi-Leitner as subscribing to Gasparri's opinion.

⁶⁰ Cf. S. C. Conc. (Tarvisina Baptismi), 4 Maii 1737,—*Thes.*, VIII. 54-55.

⁶¹ Gasparri, *De Matr.*, n. 687. He also draws arguments from further decisions given by the Holy See with regard to doubtful Baptism: S. C. S. Off., 9 Sept. 1868 (n. 688); 17 Nov. 1830 (n. 689); 5 Feb. 1851; 20 Jul. 1840 (n. 690).

⁶² *Op. cit.*, n. 695.

⁶³ See No. 66, note 6.

teenth century, the impediment received a new foundation of a theological and canonical principle, and it is not altogether evident that cases involving the logical consequences of the principle were thereby excepted on the ground that the particular case in question was not mentioned explicitly. In like manner it might be said that ignorance of the existence of the impediment in a particular case was scarcely contemplated by the custom introducing the impediment. It does not follow, however, that the ambit of the impediment was thereby restricted. Apparently, therefore, the argument based on the historical foundation of the impediment can scarcely be ventured without the challenge of a serious doubt.

205. The prescription to administer Baptism "conditionally" without prejudice to the validity of the marriage does not of itself warrant the conclusion that even if the Baptism were to be administered "absolutely", the marriage would have to be regarded as valid *ab initio*.⁴⁴ In like manner, the argument based on the fact that the Congregation did not prescribe a conditional renewal of consent nor grant a *sanatio in radice*, seems to assume the identity of the norms of procedure with reference to Baptism as it is necessary for salvation, and as it is necessary for a valid sacramental marriage.⁴⁵

206. On the other hand, a decision of the Holy Office of April 29, 1842 offers a striking confirmation of the probability of Cardinal Gasparri's opinion:

⁴⁴ "Nam ad declarandam nullitatem matrimonii requiritur certa probatio; hinc cum in suppositione facta dubius *maneant* baptismus unius coniugis, actio contra valorem matrimonii in possessione constituti necessario repellenda est per sententiam: *Non constare de nullitate matrimonii*. Quae sententia non aequivalet alteri: Certo constare de valore matrimonii ab initio."—Wernz, *Ius Decret.*, IV, n. 507, not. 28. Cf. Petrovits, *New Church Law on Matrimony*, n. 234.

⁴⁵ The Holy See has made a clear distinction regarding the two norms of procedure in the case of *doubtful* Baptism. See No. 200, note 43. The same answer, namely, to baptize *conditionally* without prejudice to the marriage could be given for a marriage of two Catholics contracted after the Code if a positive doubt would arise concerning the validity of the Baptism of one party. Nor would there be any necessity of renewing consent conditionally, nor of petitioning for a *sanatio in radice ad cautelam*. But it does not follow that the prescription to administer Baptism *absolutely* would likewise be without prejudice to the marriage. In fact this would be quite at variance with canon 1070, § 2.

1. Utrum possessio publica nominis christiani, publicaue opinio qua quis creditur christianus sive quia ortum habuit ex parentibus christianis, sive quia constanter christianae alicui communioni fuit annumeratus, christianumque se profitetur, sufficiat ad validitatem matrimonii in casu, *in quo dictus homo revera non fuisset, aut invalide fuisset baptizatus*, et matrimonium iniisset cum baptizata, non petita dispensatione disparitatis cultus: Si praedictum matrimonium declaretur invalidum propter disparitatem cultus.

Resp.: Ad 1. Iuxta exposita, Negative.⁶⁶

While, indeed, manifest difficulties arise in applying the opinion to practice,⁶⁷ Scherer's dismissal⁶⁸ of the opinion, as being wholly improbable, is scarcely justified.⁶⁹

207. The argument based on the unwillingness of the Church to grant the dispensation from Mixed Religion together with the dispensation *ad cautelam* for Disparity of Cult again appears to add further cogency to the opinion. The Holy Office, when asked on several occasions with regard to this kind of dispensation, replied in each case that the presumptions enunciated in the decree of November 17, 1830⁷⁰ were to be fol-

⁶⁶ *Fontes*, n. 888. Primarily, the answer seems to be given to the last sentence of the *dubium* proposed. Whether every phase of the *status quaestionis* preceding the ultimate question is contained in the answer is not so certain.

⁶⁷ "Ceterum, quamvis theoria haec—si solido in iure inniteretur fundamentum—sua haberet commoda, ea tamen, pluribus laborare incommodis aequae certum est. Sane, diceturne Ecclesiam, in omni casu dubii, supplere seu removere impedimentum, etiam si nulla facta fuerit inquisitio praevia, vel ea valde negligenter fuerit peracta? Quodsi, id negetur, et retineatur Ecclesiam tunc tantum supplere cum seria adhibita fuerit inquisitio, et aequae libratis argumentis et praesumptionibus pro et contra baptismum, quis, tandem, determinabit in concreto utrum dispensasse censenda sit Ecclesia, unde tamen pendet valor ipsius matrimonii?"—De Becker, *De Spons. et Matr.*, p. 239.

⁶⁸ *Handb. des Kirchenrechtes*, II, p. 374, not. 12.

⁶⁹ No decisive argument can be drawn from the decision of the Congregation of the Sacraments given on November 17, 1916. Cf. AAS, VIII (1916), 478-480. The brief summary of the reason for presenting the case ("*Ad tribunal ecclesiasticum huius Dioeceseos inductus est quidam casus circa validitatem matrimonii, quae validitas dependet a validitate baptismatis*") offers no certain parallel to the cases posited by Cardinal Gasparri, though it may cast a grave shadow of doubt upon the Cardinal's opinion. Does it refer to a marriage contracted (*in facie Ecclesiae*) by two supposedly baptized Catholics, or to a marriage (*extra faciem Ecclesiae*) of one supposedly baptized to an unbaptized person? The decision as to the invalidity of the Baptism throws no light on the nature of the marriage, nor as to the decision that was pending in the diocesan tribunal.

⁷⁰ See No. 201.

lowed.¹¹ Though a letter of Cardinal Ledochowski to the Bishop of Helena (May, 11, 1900) seems to suggest the possibility of exceptions,¹² and though De Becker¹³ and De Smet¹⁴ advised the asking of the dispensation "*ad cautelam*" in those cases where the doubt of the validity of the Baptism persevered, there is more than ordinary significance in the fact that no author consulted in the preparation of this study has pointed to a single instance of such a dispensation having been granted directly by the *Holy See* before the Code.¹⁵

208. Lehmkuhl sought to solve the difficulty by venturing the opinion that the Church in granting the dispensation from Mixed Religion implicitly granted a dispensation from Disparity of Cult.¹⁶ The opinion was manifestly at variance with a decision of the Holy Office to which Lehmkuhl does not refer:

2. *Utrum intendat Sancta Sedes dispensare etiam super impedimento disparitatis cultus quando dispensat partem catholicam ad contrahendum cum parte acatholica. Si intendat S. Sedes talem dispensationem concedere, quae validitati matrimonii sufficiat, quando dispensat super mixtae religionis impedimento, ita ut valeat matrimonium partis catholicae cum parte haeretica aut schismatica, etiamsi haec forte non fuerit baptizata.*

3. *Utrum Ordinarius dispensando virtute Indulti Apostolici super impedimento mixtae religionis, talem dispensationem concedat quae sufficiat ad validitatem matrimonii, etiamsi forte non fuerit, aut rite non fuerit baptizata pars acatholica.*

Resp.: Ad 2. Negative; Sedes enim Apostolica super impedimento disparitatis cultus nonnisi expressa, et gravissima de causa dis-

¹¹ Cf. S. C. S. Off., 7 Mart. 1862.—*NRT*, XXIV (1892), 496-497; 3 Aug. 1873.—*NRT*, XV (1883), 399-400; 18 Sept. 1890.—*NRT*, XXIII (1891), 522-523.

¹² "Quoad alterum dubium, an, scilicet, parochus in dubio an adsit in aliquo casu matrimoniali impedimentum disparitatis cultus debeat, ad cautelam, dispensationem petere, S. haec Congregatio respondet *in singulis casibus ad ipsam recurrendum esse, exponendo particularem casum de quo agitur.*" —De Becker, *De Spons. et Matr.*, p. 240.

¹³ *Op. cit.*, p. 240-241.

¹⁴ *De Spons. et Matr.*, (ed. 1909), n. 290.

¹⁵ De Becker (*loc. cit.*), however, is sponsor for the statement that such dispensations were frequently granted by Diocesan Curiae. The Curial records of at least some American dioceses will confirm this.

¹⁶ *Theol. Mor.*, II, n. 752. Vide etiam Göpfert, *Moraltheologie*, III, n. 243.

pensat. In reliquis detur decretum feriae IV, 17 Nov. 1830 super precibus R. P. D. Episcopi Anicien.

Ad 3. Provisum in secundo.⁶⁷

Lehmkuhl's opinion appears, therefore, to enjoy no further probability.⁶⁸

209. On the other hand, the very decision which apparently removes the probability of Lehmkuhl's opinion is but a continuation of the decree cited to demonstrate the probability of Cardinal Gasparri's opinion.⁶⁹ The line of demarcation is not as clear as it may appear at first sight. Moreover, the answer favoring Cardinal Gasparri's opinion was given as a negation to the *dubium* as it was proposed ("*iuxta exposita*"),—at least the answer is scarcely stated in the form of the general principle proposed by Cardinal Gasparri. Again, the answer to the second part of the second *dubium* by its reference to the decree of November 17, 1830, casts some difficulties in the way of the absolute acceptance of the opinion. The decree of 1830 appears to serve for both contemplated and contracted marriages.

210. Yet the probability of Cardinal Gasparri's opinion is not wholly destroyed and due cognizance should be taken of it. It has no value, however, in determining the validity of marriages contracted after the Code.⁷⁰ For the purpose of determining the validity of Pre-Code marriages, an account of the opinion need be taken only with regard to the marriages of two supposedly baptized Catholics. The opinion need not be heeded with reference to the marriages of two non-Catholics for their Baptisms were not submitted to the Church's investigation before marriage to establish the presumption of validity. If the marriage *post contractum* is thereupon brought to the attention

⁶⁷ S. C. S. Off., 29 Apr. 1842,—*Fontes*, n. 888.

⁶⁸ Cf. Cappello, *De Sacram.*, III, n. 423; Petrovits, *New Church Law on Matrimony*, n. 241; De Smet, *De Spons. et Matr.*, p. 516, not. 4; Ay-rinhac, *Marriage Legislation*, p. 151; Durieux, *The Busy Pastor's Book on Matrimony*, p. 95, note 124; Vlaming, *Prael. Iuris Matr.*, n. 296. Pighi's opinion (*De Matr.*, n. 50): "Baptismus enim dubius relate ad matrimonium praesumitur collatus, et collatus valide; quod si objective collatus valide non fuerit, *Ecclesia pro matrimonio dispensationem supplere censetur*", seems to lack both intrinsic and extrinsic probability, especially after the Code. See *infra* No. 251, note 85.

⁶⁹ See No. 206.

⁷⁰ Cf. canon 1070, § 2.

of the Church, the result of this investigation must determine the validity of the marriage *ab initio*.⁷¹ On the basis of the decision of April 29, 1842, the marriage of a Catholic to an unbaptized non-Catholic, contracted with but a dispensation from the impediment of Mixed Religion, would apparently be invalid *ab initio*.⁷² But in the event of a marriage (*before the Code*) of two supposedly baptized Catholics, if proof is furnished that one of the parties was not baptized, a declaration of nullity should not be given without consulting the Holy Office.⁷³

ART. V. DOUBTFUL BAPTISM IN MARRIAGES CONTRACTED AFTER THE CODE

211. The general principle that doubtful Baptism is presumed to be valid "*in ordine ad validitatem matrimonii*" is in force also after the Code but it is conditioned by the principle "*in dubio standum est pro valore matrimonii*." With reference to the impediment of Disparity of Cult, the principle of the legislation in the Code is stated as follows:

CANON 1070, § 2

Si pars tempore contracti matrimonii tanquam baptizata communiter habebatur aut eius baptismus erat dubius, standum est, ad normam can. 1014, pro valore matrimonii, donec certo probetur alteram partem baptizatam esse, alteram vero non baptizatam.

§ I. RESTRICTED REFERENCE OF CANON 1070, § 2

212. The prescriptions of canon 1070, § 2, do not propose a general norm to be applied without exception in judging of the validity of any marriage whatever, contracted without dispensation.⁷⁴ If canon 1070 be examined contextually, both with

⁷¹ Cf. Wernz, *Ius Decret.*, IV, n. 508, not. 33.

⁷² This conclusion receives added confirmation from the argument presented in the Reid-Parkhurst case. Cf. AAS, II (1910), 584-600.

⁷³ Cf. Wernz, *Ius Decret.*, IV, n. 507, not. 30; Cappello, *De Sacram.*, III, n. 419, d; Chelodi, *Ius Matr.*, n. 80, 2, c; Wernz-Vidal, *Ius Canonicum*, V, n. 270.

⁷⁴ Arendt ("*Brevis Animadversio circa Interpretationem Doctrinalem § 2ae Canonis 1070*", *Jus Pont.*, V [1925], 134) takes exception with sound logic to the affirmation of Wernz-Vidal (*Ius Canonicum*, V, n. 268).

reference to its component parts, and with reference to its position among the canons in the Chapter "*De impedimentis dirimentibus*", it will be manifest that the entire canon deals exclusively with the impediment of Disparity of Cult. Since the ambit of the impediment is defined in canon 1070, § 1, and since the entire canon deals with the impediment of Disparity of Cult, the extension and restriction of canon 1070, § 1, must be kept in mind when determining the provisions of canon 1070, § 2. The marriages of baptized non-Catholics (who have never been converted to the Catholic Church) with the unbaptized, are not included in the terms of canon 1070, § 2. Only those marriages are comprehended, therefore, in which at least one of the parties at the time of the contracting of the marriage was bound by the impediment of Disparity of Cult as it is defined in the Code.⁷⁵

§ II. "*Standum est pro valore matrimonii*"

213. Canon 1070, § 2, in establishing the norms of determining the validity of a marriage with reference to the impediment of Disparity of Cult, has ushered in a change regarding the interrelation of two principles. In the law before the Code, the principle "*standum est pro valore matrimonii*" yielded to the principle "*standum est pro valore baptismi*". After the Code, the principle favoring the validity of a marriage takes precedence over the principle favoring the validity of Baptism where the latter would be prejudicial to the validity of the marriage. The general norm contained in canon 1014⁷⁶ is given a specific application with regard to the impediment of Disparity of Cult.

⁷⁵ Cf. Vlaming, *Prael. Iuris Matr.*, n. 291 bis; Hilling, *Das Eherecht des C. I. C.*, p. 30, not. 1; Linneborn, *Grundriss des Eherechts*, p. 200, not. 2; Leitner, *Lehrb. des kath. Eherechts*, p. 185; Blat, *Comment.*, Vol. III, P. I, n. 467; Genicot-Salsmans, *Theol. Mor.*, II, n. 594; Arendt, *loc. cit.* While the authors cited all agree as to the restriction of canon 1070, § 2, their phrasing is not always apt. There is need of care in stating the restriction correctly. It is not altogether accurate to say that canon 1070, § 2 refers only to the marriages of a Catholic with a non-Catholic, or, that at least one of the parties must be a Catholic. The term "Catholic" needs some qualifying phrase to bring out the proper designation. It is not necessary that the party bound by the impediment of Disparity of Cult, as it is defined in the Code, be a Catholic by profession of faith at the time of the marriage.

⁷⁶ "*Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur, salvo praescripto can. 1127.*" —Canon 1014.

§ III. "*Donec certo probetur*"

214. The presence of the impediment of Disparity of Cult is not admitted to exist in a marriage contracted after the Code until it is *proved with certainty* that at the time of the contracting of the marriage, one of the parties was baptized, and the other was not baptized. The certainty required is a moral certainty for obviously it is impossible to arrive at a physical certainty regarding the validity of a Baptism. Where positive doubts arise after the contracting of the marriage as to the validity of the Baptism of one of the parties, a serious investigation must be made to resolve the doubt of the Baptism into moral certainty of its validity or invalidity.

215. This moral certitude may be acquired either through direct proof or through the legitimate use of presumptions. If the doubt remains unsolved,—"*standum est pro valore matrimonii*". With reference to the marriage of two Catholics, if an insoluble doubt of the Baptism of either, or of both parties arises, the safer course must be followed in providing a moral certainty of the presence of a valid Baptism necessary for salvation. Conditional Baptism must, therefore, be administered *without prejudice to the validity of the marriage*, i. e., no conditional renewal of consent is required, nor the application of a *sanatio in radice ad cautelam*.⁷⁷ The same manner of procedure is to be observed with regard to a doubtful Baptism of a Catholic in a mixed marriage. But conditional Baptism is not to be administered to the non-Catholic party whose Baptism is doubtful, unless he becomes a convert to the Catholic Church.⁷⁸

216. A direct proof of Baptism may be acquired through witnesses,⁷⁹ or through documents.⁸⁰ If direct proof cannot be

⁷⁷ Cf. Cerato, *Matr.*, n. 65; Chelodi, *Ius Matr.*, n. 80, 2, a; Petrovits, *New Church Law on Matrimony*, n. 240; Wernz-Vidal, *Ius Canonicum*, V, n. 269; Linneborn, *Grundriss des Eherechts*, p. 200, not. 4; Cappello, *De Sacram.*, III, n. 419, a, cum not. 12.

⁷⁸ "Reprobandum atque illicitum omnino esse praxim administrandi a parochis baptismum sub conditione parti *acatholicae*, quae in haeresi permanere declarat, quando dubium circa eiusdem sacramenti validitatem exoritur. Tunc enim tantummodo licite id fieri potest, cum pars heterodoxa paratam se praebeat abiurandi errores ac redeundi ad gremium Ecclesiae catholicae."—S. C. S. Off., 13 Apr. 1878,—Wernz, *Ius Decret.*, IV, n. 507, not. 29.

⁷⁹ Cf. canons 742, § 1; 779.

⁸⁰ Cf. canons 1813-1816; 1990. Vide etiam Cappello, *op. cit.*, III, n. 420; Vlaming, *Prael. Iuris Matr.*, n. 293; De Smet, *De Spons. et Matr.*, p. 515, not. 4; Hilling, *Das Eherecht des C. I. C.*, p. 31.

had, recourse is left to indirect proof through presumptions.⁸¹ If there is evidence for the fact of the administration of Baptism, the decree of the Holy Office of November 17, 1830,⁸² will serve as a guide in attaining moral certainty of the validity or invalidity of the Baptism. If a doubt arises as to the very fact of its administration, the decision of the Holy Office of August 1, 1883,⁸³ sent to Bishop Gross of Savannah will serve as a reliable guide. Bishop Gross had proposed the following questions:

"I. May ignorance as to the fact of the administration or non-administration of Baptism be solved on the principle of presumption when the validity or invalidity of a contracted marriage depends on the solution?"⁸⁴

"II. In this ignorance as to the administration of Baptism, is the principle of presumption in relation to the validity of a contracted marriage correctly applied in the following cases:

"1. Baptism is not to be presumed if the parents of the non-Catholic party or parties are members of a sect that rejects Baptism.

"2. The same conclusion holds for those whose parents are members of a sect that does not admit infant Baptism, namely, in which Baptism is not conferred except to adults,—for instance, at the age of thirty, as is the custom of the Baptists.

"3. The same is to be said of those whose parents, while living, professed their unwillingness to join a sect, preferring, as they say, to worship a supreme Being by an honest and upright life, rather than by any special worship.

"4. If the parents were zealous members of a sect that regards Baptism as necessary, or, at least, in which it is ordinarily administered, the Baptism of the children is to be presumed. But what if their parents were indifferent or negligent members of such a sect, or adhered to a sect, which, though not rejecting Baptism, does not regard it as necessary, and ordinarily does not administer it? Is Baptism to be presumed in both instances or in either of them?

⁸¹ See No. 198, note 41; S. C. de Prop. F., 2 Aug. 1901,—ASS, XXXIV (1901-1902), 640.

⁸² See No. 201, with note 44.

⁸³ *Fontes*, n. 1083.

⁸⁴ Bishop Gross quotes the affirmative opinion of Kenrick, *Theol. Mor.*, Tract. XXI, n. 48.

"5. If only one parent is a zealous member of a sect that regards Baptism as necessary and ordinarily administers it, and if this parent has the unquestioned ascendancy over the child's education, the child's Baptism is to be presumed.

"The same is to be said if, after investigation, ignorance or doubt still remains as to whether such a parent exercised the predominant control over the child's education. But what if neither the sect, nor the disposition of mind of the parent, having the principal control over the child's education, favors Baptism, while the disposition of the less influential parent and his sect are favorably inclined towards Baptism?

"6. Cases in which no presumption favors Baptism should be governed by the rule: *factum non praesumitur, sed probandum est.*"

217. To these questions the Holy Office replied:

"In answer to *I*.—Affirmatively, provided that each case has first been investigated.

"In answer to *II*.—Affirmatively with regard to the first, second and third article, and the first part of the fourth⁸⁵ and fifth article, but in the latter article, after the words 'predominant control over the child's education', are to be inserted the words 'and the other parent is not known to be positively opposed to Baptism, then Baptism is to be presumed'. With regard to the other cases noted in the second part of the fifth article, recourse must be had to the Holy See with a complete exposition of all the circumstances calculated to shed light on the case presented. The sixth inquiry is provided for in the preceding answers."⁸⁶

218. By way of summary, the following solutions of the possible hypotheses arising in marriages contracted after the Code, may be of some assistance. When the modifying expression of "certainly unbaptized" is predicated of the term "Catholic" the word "Catholic" is to be understood in the sense of "reputed Catholic". The word "certainly" is used by way of

⁸⁵ The answer to the second part of the fourth article is not given. It seems that such cases should be sent to the Holy Office for decision.

⁸⁶ With few modifications, the translation is that of Petrovits, *New Church Law on Matrimony*, n. 238.

contrast to the word "doubtfully". "Doubtfully" is employed in the sense of doubt insoluble after due investigation. The invalidity or validity predicated of the marriage is only with reference to the prescriptions of canon 1070, § 2.

1. A certainly baptized Catholic married to a certainly baptized Catholic or non-Catholic—marriage is valid.

2. A certainly baptized Catholic married to a doubtfully baptized Catholic or non-Catholic—marriage is valid.

3. A certainly baptized Catholic married to a certainly unbaptized Catholic or non-Catholic (both conditions verified to have existed at the time of the contracting of the marriage)—marriage is to be considered invalid.

4. A doubtfully baptized Catholic married to a doubtfully baptized Catholic or non-Catholic—marriage is valid.

5. A doubtfully baptized Catholic married to a certainly unbaptized Catholic or non-Catholic—marriage cannot be declared invalid.⁷⁷

6. A certainly unbaptized Catholic married to a certainly baptized non-Catholic—marriage is valid.⁷⁸

7. A certainly unbaptized Catholic married to a doubtfully baptized non-Catholic—marriage is valid.⁷⁹

8. A certainly unbaptized Catholic married to a certainly unbaptized Catholic or non-Catholic—marriage is valid.⁸⁰

§ IV. CANON 1070, § 2, IN RELATION TO MARRIAGES CONTRACTED BEFORE THE CODE

219. It has already been demonstrated that canon 1070, § 2, must be interpreted in the light of canon 1070, § 1,—that it establishes norms of determining the presence in contracted marriages of the impediment of Disparity of Cult *as it*

⁷⁷ With regard to this conclusion the following authors may well be consulted: Cappello, *De Sacram.*, III, n. 419, b; Cerato, *Matr.*, n. 65, 3; Chelodi, *Ius Matr.*, n. 80, 2; De Smet, *De Spons. et Matr.*, n. 587; Farrugia, *De Matr.*, n. 170; Vermeersch-Creusen, *Epitome*, II, n. 345; Ayrinhac, "Disparity of Worship in the New Code", *AER*, LXI (1919), 696; Wernz-Vidal, *Ius Canonicum*, V, n. 269. See *infra* No. 167, note 50.

⁷⁸ Canon 1070, § 1.

⁷⁹ Canon 1070, § 1.

⁸⁰ It is a *matrimonium simpliciter legitimum*.

is defined in the Code.²¹ It seems but a reasonable deduction, therefore, to say that canon 1070, § 2, applies only to marriages contracted after the Code. De Smet, on the other hand, does not admit this conclusion and ventures the opinion that since canon 1070, § 2 gives precedence to the principle "*standum est pro valore matrimonii ad normam can. 1014*", this precedence must be observed also in judging of the presence of the impediment of Disparity of Cult in marriages contracted before the Code.²²

220. With regard to the law before the Code favoring the validity of Baptism even to the prejudice of the validity of a marriage, it may be said that this was not a mere human conjecture of validity enunciated solely for a practical service in determining the validity of a marriage. The presumption of the validity of a doubtful Baptism was and is a presumption based on the divine law itself.²³ Given the evidence of the conferring of the baptism rite,²⁴ there is a "*praesumptio iuris ET DE IURE DIVINO*" that the person to whom the rite has been administered is subject to the laws of the Church. This presumption will not admit a direct proof of the contrary but only an indirect proof. To destroy the force of the presumption it must be shown either that the rite was not conferred, or that it was invalidly conferred. The presence of the character of Baptism is judged from the presence of the rite and not *vice versa*. If the rite has been administered the character is presumed to be present by a presumption founded on the divine law,—for Christ in instituting the sacrament of Baptism instituted an *external rite* having the divine efficacy of imprinting a character on the soul. The presumption that a doubtfully baptized person is subject to the

²¹ See No. 212.

²² "... praesumptio, canone 1070, § 2, statuta, de favore praestando, iuxta normam canonis 1014, matrimonii valori, applicanda videtur matrimoniiis de quorum validitate nunc est iudicandum, licet contracta sint sub disciplina Codici anteriori, sub qua disciplina vigeat praesumptio in favorem Baptismi."—*De Spons. et Matr.*, n. 475. Vide etiam *op cit.*, n. 587.

²³ See No. 201, note 46.

²⁴ See No. 201, note 47. Vide etiam S. C. S. Off., 8 Maii 1924,—*AER*, LXXI (1924), 405-406. In this latter case there was question of a total ignorance as to whether Baptism had been received by one party.

laws of the Church holds, therefore, both for the internal and external forum.

221. When, therefore, the impediment of Disparity of Cult, as it existed before the Code, bound all the baptized, it did not distinguish between those who had been doubtfully or certainly baptized,—rather it included all who had been admitted to the Church's jurisdiction through the sacrament of Baptism as it is recognizable by the administration of the Baptismal rite. The marriage of a doubtfully baptized person with an unbaptized person was, consequently, invalid *ab initio* by a *praesumptio iuris ET DE IURE DIVINO* for the very reason that the doubtfully baptized were bound by the impediment *ante contractum*. They were included in the very law of the impediment.

222. Canon 1070, § 2 does not destroy this presumption but rather releases from the *consequences* of the presumption where they would be prejudicial to the validity of a marriage on the basis of the impediment of Disparity of Cult. It does not follow, however, that this release is retroactive.* The marriages of those baptized in the Catholic Church with the unbaptized, *if contracted before the Code*, are not declared invalid on the basis of canon 1070, § 1 but on the basis of the law that bound *all* the baptized. According to canon 1070 § 2, the marriages of the doubtfully baptized (the term "baptized" to be understood in the light of canon 1070, § 1) with the unbaptized cannot be declared invalid since the canon has released the doubtfully baptized from the consequences of this subjection to the law regarding the impediment of Disparity of Cult. But since canon 1070, § 2 in no way implies the granting of a *sanatio*

* "Vis novi Codicis estne retroactiva in his, quae modificantur circa sponsalia et impedimenta tum impediencia quam dirimentia matrimonium, ita ut quodlibet ius acquisitum vigore sponsalium validorum, nullimode possit reclamari, nisi in quantum novus Codex concedit, et contracta impedimenta modificata a novo Codice, nulla dispensatione indigeant?" *Resp.* "Codicis, etiam quoad sponsalia et impedimenta, non esse vim retroactivam, sponsalia autem et matrimonia regi iure vigenti quando contracta sunt vel contrahentur, salvo tamen, quoad actionem ex sponsalibus, canone 1017, § 3."—Pont. Comm., 2-3 Jun. 1918, *Dubia* (IV) *De Matr.*, n. 6.—AAS, X (1918), 346.

*in radice*²² to marriages contracted *before the Code* by the doubtfully baptized with the unbaptized, it may be asked: when did such marriages (invalid *ab initio* according to the law before the Code) become valid? In other words, why are such pre-Code marriages to be judged by canon 1070, § 2 the prescriptions of which are to be interpreted in the light of canon 1070, § 1? Canon 1070, § 2 seems, therefore, to apply only to marriages contracted *after the Code*. The determination of the presence of the impediment of Disparity of Cult is to be governed by the *law* under which the marriage was contracted.

²² Cf. Pont. Comm., 2-3 Jun. 1918, *Dubia* (IV) *De Matr.*, n. 7.—AAS, X (1918), 346.

CHAPTER XI

CESSATION AND DISPENSATION

ART. I. CESSATION OF THE IMPEDIMENT OF MIXED RELIGION AND OF THE PROHIBITIONS OF CANONS 1065 AND 1066

223. With reference to both the divine and ecclesiastical law, the impediment of Mixed Religion ceases *ipso facto* if, antecedent to the marriage, the non-Catholic party becomes a convert to the Catholic Church. Where conversion does not take place the prohibition derived from the divine and natural law could, indeed, cease, yet the prohibition of the Church still remains.¹ Much the same may be said with reference to the prohibitions contained in canons 1065 and 1066. As soon as those who have notoriously left the Faith or joined condemned societies return to the Church or renounce their membership in such societies, the pastor may assist at their marriages, whether they be with Catholics who have never fallen into such delinquencies, or with those who like themselves have again been reconciled to the Church. The prohibition to assist at the marriages of Catholics with public sinners or those notoriously under censure ceases likewise upon the delinquents' reconciliation with the Church.²

¹ Cf. Benedictus XIV, *De Synodo Dioec.*, Lib. IX, cap. III, n. 4. The prohibition of the divine law may well have ceased at the time when all the conditions required for dispensation are realized, yet the marriage would be illicit until the Church has removed the impediment. Cf. Wernz, *Ius Decret.*, IV, n. 582; Benedictus XIV, *op. cit.*, Lib. VI, cap. V, n. 4; Feije, *De Imped. et Dispens.*, n. 567; Cappello, *De Sacram.*, III, n. 307; Cerato, *Matr.*, n. 54; Vlaming, *Prael. Iuris Matr.*, n. 211.

² Cf. S. Poenit. 10 Dec. 1860.—Feije, *op. cit.*, n. 277. In the case of a public sinner it is sufficient that he go to confession, but if possible this should be in a public place such as in a Church. If, on the other hand, it is made in a private place, the fact of the confession should generally be made known in order that the assistance of the pastor at his marriage will not be an occasion of scandal. The giving or refusal of absolution will not affect the procedure in the external forum. Cf. Cappello, *op. cit.*, III, n. 332; Cerato, *Matr.*, n. 60; Chelodi, *Ius Matr.*, n. 67; Wernz-Vidal, *Ius Canonikum*, V, n. 202. If there is question of an absolution from censure, canon 2251 must be taken into consideration.

ART. II. CESSATION OF THE IMPEDIMENT OF DISPARITY OF CULT

224. The divine law forbidding the marriages of Catholics with the unbaptized is, generally speaking, fundamentally the same as that for mixed marriages, provided that the unbaptized party adheres to a non-Catholic profession of faith.* The diriment element of the impediment of Disparity of Cult, which through the law of the Church rests upon a foundation quite distinct from that of the impediment of Mixed Religion, ceases upon the Baptism of the unbaptized party.⁴ On the other hand, a marriage laboring under the impediment of Disparity of Cult does not become valid *ipso facto* upon the Baptism of the infidel party.⁵ True marital consent must be renewed or a *sanatio in radice* applied. The liceity and validity of the renewal of consent must be judged in accordance with the requirements of the law of the Church in the time and place of the renewal.

§ I. CESSATION THROUGH URGENT AND COMMON NECESSITY

225. The authors are somewhat divided in their opinions with reference to the cessation of impediments because of extraordinary circumstances. Some deny absolutely any cessation whatever unless it be through dispensation. Others distinguish between diriment and prohibitive impediments and affirm that neither cease for mere particular instances.⁶ In the case of common necessity, some authors maintain that only prohibitive im-

* In this respect the natural and divine law contemplates only the marriages of Catholics with the unbaptized (who are also non-Catholics in their religious beliefs). The diriment element of the impediment, which before the Code bound all the baptized, is of ecclesiastical origin. It would be somewhat farfetched to urge the presence of a divine prohibition to all marriages of baptized non-Catholics with the unbaptized.

⁴ For the cessation of the impediment of Disparity of Cult it is not necessary that the infidel receive Baptism in the Catholic Church. The fact of the valid reception of Baptism is sufficient to suppress the impediment. Cappello (*De Sacram.*, III, n. 425) and Wernz-Vidal (*Ius Canonicum*, V, n. 272) refer, however, to the requirement of Baptism in the Catholic Church.

⁵ S. C. S. Off., 12 Jan. 1769,—*Fontes*, n. 822; 8 Mart. 1899,—*Fontes*, n. 1217; Sylvius, *Comment. in Tertiam Part. S. Thomae*, Suppl., Q. LIX, art. I, concl. 3.

⁶ See Cappello (*De Sacram.*, III, n. 199) who cites the various opinions sponsored by the authors.

pediments cease, while others urge this cessation also for diriment impediments.⁷ As a general rule, laws that bind under pain of invalidity urge their force in both common and particular necessity unless exception may, perhaps, be made for particular regional circumstances which would be such that persons would be forced either to marry with an impediment or to abstain from marriage entirely.⁸ The authors are wont to apply this principle of the superiority of the natural right to marriage over the obstacle of the ecclesiastical impediment of Disparity of Cult. The following case upon which the Holy Office gave a favorable decision is urged by some⁹ in support of their opinion.

226. It had often happened in Manchuria that Chinese Christians in order to escape persecution or to procure a better livelihood, or for other reasons, moved with their family to totally pagan places that were a forty or fifty day's journey from Christian localities. Since it was impossible for children of such families to go to Christian communities, they were forced in these circumstances either to marry pagans or to remain unmarried. Accordingly it was asked whether these children were bound by the impediment of Disparity of Cult, and what was to be done where those so married were unmolested as to their religion, and were in good faith as to the validity of the marriage. To this inquiry the Holy Office replied: "*In propositis circumstantiis non esse inquietandos, facto verbo cum SSmo. SSmus approbavit.*"¹⁰ Other authors, though they admit of a

⁷ Cf. Cappello, *loc. cit.* St. Alphonsus (*Theol. Mor.*, Lib. VI, n. 613) does not introduce the distinction between diriment and prohibitive impediments but does invoke the argument based on a benign interpretation of the mind of the legislator. Yet the cases he postulates are not the same as those contemplated in the present discussion. St. Alphonsus with Sanchez (*De Matr.*, Lib. II, Disp. 40, nn. 7-12) and most of the older authors refers only to the presumed faculty of a Bishop or a confessor (especially for occult impediments) to dispense in urgent necessity from an impediment reserved to the Holy See. The cases here under consideration refer rather to those circumstances where neither the Bishop, the pastor, nor a confessor can be approached to petition for a dispensation.

⁸ Vlaming, *Prael. Iuris Matr.*, n. 198; Cappello, *loc. cit.*; De Smet, *De Spons. et Matr.*, n. 469; Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. III, nn. 318-321; Gasparri, *De Matr.*, n. 311; Tanquary, *Theol. Mor.*, I, n. 926.

⁹ Farrugia, *De Matr.*, n. 169; De Becker, *De Spons. et Matr.*, p. 230-231; Vlaming, *loc. cit.*; Petrovits, *New Church Law on Matrimony*, n. 241; Genicot-Salsmans, *Theol. Mor.*, II, n. 491.

¹⁰ S. C. S. Off. (Mandciuriae), 4 Iunii 1851,—*Coll.*, n. 1062.

cessation of the impediment on the intrinsic value of the argument based on the superiority of the natural right to marriage, deny any conclusive force to arguments drawn from this answer of the Holy Office.¹¹

227. On the other hand there are decisions which cast a serious doubt even upon the theoretical value of the principle of cessation. Rather than declare the cessation of the impediment in circumstances similar to those mentioned in the inquiry of 1851, the Holy Office in one instance gave a faculty for three particular cases to an Apostolic Vicar to grant dispensations by way of anticipation from the impediment of Disparity of Cult.¹² The same Congregation, moreover, denied that entire ignorance of the Church's impediments,¹³ or that persecution of the Christians by the Japanese Government offered a sufficient reason for supposing that the impediment had ceased.¹⁴ If, then, the impedi-

¹¹ Wernz (*Ius Decret.*, IV, n. 510; n. 66, Scholion) seriously questions the objective value of the intrinsic argument and with reference to the answer of the Holy Office of June 4, 1851 remarks (n. 510 not. 37): "Nam ex ipsis verbis: 'Facto verbo etc.' patet R. Pontificem non dedisse aliquam declarationem de impedimento iam sublato, sed potius aliquam gratiam. Porro 'approbatio' R. Pontificis parum iuvat adversarios; etenim omnia responsa S. C. Inq. etiam tolerantiae vel dissimulationis solent a R. Pontifice in forma communi approbari. Tandem ratio intrinseca non est ad rem; nam leges irritantes Ecclesiae in casibus particularibus et publicis adeo generaliter cessare non obstantibus rationibus mere theoreticis ob defectum consensus legislatoris non est doctrina undequaque practice tuta." Vide etiam Chelodi, *Ius Matr.*, n. 81; Cappello, *De Sacram.*, III, n. 199, not. 11; Wernz-Vidal, *Ius Canonicum*, V, n. 273, not. 41; Gasparri, *De Matr.*, n. 711.

¹² S. C. S. Off., instr. (ad Vic. Ap. Oceaniae Central.), 18 Dec. 1872,—*Fontes*, n. 1024.

¹³ S. C. Off. (Iaponiae), 11 Mart. 1868,—*Fontes*, n. 1004.

¹⁴ "1. Utrum in Iaponensi Imperio, perdurante saeculari persecutione, necnon Pastorum et doctrinae privatione perseverante, impedimenta ab Ecclesia instituta totam matrimonia dirimendi vim obtinuerit. Inde, utrum omnia matrimonia cum talibus impedimentis dirimentibus contracta invalida sint. Ratio dubii in eo est quod, cum ignorantia de matrimonii natura et impedimentis omnino universalis et invincibilis esset, forsitan praesumitur Ecclesia de talibus impedimentis dispensasse, necnon suas leges circa matrimonium in hoc casu totam vim obtinere noluisse. 2. In casu affirmative suppliciter ac humillime imploro ut SSmus dispensationem a radice, qua omnia matrimonia nulla ob impedimenta iure Ecclesiae dirimentia revalidentur, benigne concedere dignetur.

"R. Ad 1. Providebitur in sequenti.

"Ad 2. Quoad eos qui sunt in bona fide, R. P. D. Vicarius Ap. sileat omnino. Quoad eos qui in bona fide non sunt, curet ut consensus renovetur, dispensationem concedendo iuxta facultates iam ipsi factas a S. C. de Prop. Fide . . . In casibus vero difficilioribus, recurat, expositis omnibus cuiusque casus adiunctis."—S. C. S. Off. (Iaponiae), 11 Mart. 1868,—*Fontes*, n. 1004. Cf. S. C. S. Off., 12 Ian. 1769, n. II, 5.—*Fontes*, n. 822; (Coreae), 11 Sept. 1878,—*Fontes*, n. 1057.

ment is declared not to cease even in the dire times of persecution when Christians are dispersed among pagan communities through no fault of their own, it will be practically impossible for any local tribunal to give a declaration regarding the validity of marriages contracted with the impediment of Disparity of Cult in the extraordinary circumstances postulated by the authors without recourse to the Holy Office.¹⁵

ART. III. OBLIGATIONS OF ORDINARIES AND PASTORS

CANON 1064

Ordinarii alique animarum pastores:

1° *Fideles a mixtis nuptiis, quantum possunt, absterreant;*

2° *Si eas impedire non valeant, omni studio curent ne contra Dei et Ecclesiae leges contrahantur.*

228. The Holy See has ever insisted that Ordinaries and pastors in charge of souls labor with all diligence to deter the faithful from contracting mixed or disparate marriages.¹⁶ Scarcely a diocesan synod of this country has remained silent upon this all important duty. Admittedly, mixed and disparate marriages have been on the increase, but before becoming too sharp in criticism of this fact it is well to remember that the conditions in this country have been quite singular. The vast area of many parishes, the large non-Catholic population, and the problems of immigration and education have made truly arduous the task of preventing mixed and disparate marriages. Such conditions do not absolve from a continued vigilance, but they do, perhaps, account in large measure for the accentuated problem of mixed marriages in this country. While the Church has always protested against such unions, she has likewise been disposed to face situations as they actually exist and to recommend patience¹⁷ rather than an unguided zeal. If, therefore, mixed and disparate

¹⁵ Cf. S. C. S. Off. (Iaponiae), 11 Mart. 1868.—*Fontes*, n. 1004; De Becker, *De Spons. et Matr.*, p. 231.

¹⁶ See also canons 1065, § 1; 1071.

¹⁷ Cf. Pius VII, breve ad Archiep. Moguntin., 8 Oct. 1803, n. 5,—*Fontes*, n. 477; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482; Gregorius XVI, litt. ap. *Quas vestro*, 30 Apr. 1841, n. 5,—*Fontes*, n. 497; Feijé, *De Matr. Mixtis*, p. 227-230.

marriages cannot always be prevented, she will acknowledge the gravity of such situations and dispense rather than cause greater evils and even greater defections from the Faith. It is the duty of Ordinaries and pastors to see that when such marriages cannot be prevented, they will not be contracted against the laws of God and of the Church. The obligation implies more than a mere care to see that all the conditions requisite for dispensation are fulfilled,—it implies likewise a prudent zeal in preventing the clandestine entry into such unions.¹⁸

§ I. SHOULD DISPENSATIONS BE ABSOLUTELY ABOLISHED?

229. The growing number of mixed and disparate marriages has recently elicited a recommendation that dispensations be entirely abolished. The abuses connected with dispensations form the principle grounds of the argument as it is presented by Father Woywod.¹⁹ It is contended that the present practice fosters a dangerous levity among Catholic people; that their mere will to contract a marriage with non-Catholics is often the only cause found for petitioning for a dispensation, and that dispensations granted for such causes render the law ineffectual; that the moral certainty of the sincerity of the "promises" may often be seriously questioned. The absolute refusal of dispensations, it is urged, will do more good than harm; it will stop many defections from the Faith that are now traceable to mixed marriages; it will give Catholics a more wholesome appreciation of their faith.

There is nothing really new in this attitude towards dispensations for mixed marriages,—in fact it was the attitude of the Church for centuries. But what is significant is that the Church herself has found it necessary to depart from the rigor of this absolute discipline.²⁰

¹⁸ Cf. Petrovits, *New Church Law on Matrimony*, n. 195.

¹⁹ "Should Dispensations for Mixed Marriages be Altogether Abolished?"—*HPR*, XXVIII (1928), 701-711. The same volume of this Review (pages 954-959, 1066-1071, 1193-1197, 1315-1318) contains an open discussion of the subject by correspondents. A last article by Father Woywod ("Dispensations for Mixed Marriages", *HPR*, XXIX [1928], 125-134) closes the discussion in this Review.

²⁰ Some European dioceses have attempted to enforce the discipline of refusing dispensations (cf. *HPR*, XXVIII [1928], 708; Linneborn, *Grundriss des Eherechts*, p. 166) yet the very diocese of Liverpool, to which Father Woywod refers, apparently permits exceptions to its rule.

230. Admittedly, the wish of the parties to marry is not of itself a sufficient cause for dispensation, and a dispensation granted on this ground alone would be invalid.²¹ If the wish to marry is the only ground that can be urged on which to seek a dispensation from the impediment it is, indeed, a grave abuse to convert a mere wish into the canonical terminology of such a recognized cause as "*periculum matrimonii civilis*". A salient issue, therefore, regards the objective existence of the cause or causes cited.

231. On the other hand, while the wish to marry is not of itself a sufficient cause for dispensation, it may be said that the danger of a civil marriage and other causes that are alleged with some frequency are, nevertheless, connected in some way with the wish to marry. Often, too, such causes imply grave sin. As a matter of fact, a large percentage of the causes recognized as canonical in the lists given by Cardinal Masella²² and the Congregation of the Propaganda²³ have a connection with sin or are a direct outcome of it. It would be quite wrong, however, to accuse the Church of placing a premium on sin in order that those impeded from marrying may marry. Yet the Church does take cognizance of such and other situations as offering grave reasons why her law should be dispensed from in particular cases. The justified exceptions but emphasize the existence of the law.

232. The implication of sin or the connection of the cause with the will to marry does not necessarily, however, destroy the recognized gravity of the cause. The cause represents a situation or a reason *in addition* to the wish to marry; an evil that could not be averted, or a good that could not be realized unless a dispensation were given. It is these additional elements that move the Church to dispense. In order to avoid embarrassment there may be a temptation at times to allege such causes as "*periculum matrimonii civilis*", "*spes conversionis*" and others as a last resort in the hope that at least one will fit the

²¹ Cf. S. C. de Prop. F., encycl., 11 Mart. 1868,—*Coll.*, n. 1324; De Justis, *De Dispens. Matr.*, Lib. III, cap. I, n. 8; Giovine, *De Dispens. Matr.*, Tom. I, § LXV, n. 4; Linneborn, *loc. cit.*

²² See No. 283, note 20.

²³ See No. 283, note 18.

case,—without determining carefully the reality of their existence. If such abuses do exist the imperative need of immediate correction is manifest, yet the existence of such abuses scarcely offers a convincing reason for the refusal of all dispensations. That the danger of civil marriage does exist in many instances, is a situation that may not be lightly dismissed nor cast aside altogether as an insufficient cause, even though it is intimately connected with the will of the parties to marry.²⁴ In addition to the correction of abuses (and it is well to remember on whom the accusation rests) a concern even more fundamental may well center on the factors responsible for the all too prevalent "nominal Catholicity" that gives rise to such causes.

233. The attention called to the questionable moral certainty of the fulfillment of the "promises" deserves serious consideration.²⁵ It is doubtful, however, whether the validity of many of the dispensations is to be challenged on this score. Too much stress must not be given an argument based on the statistics of the evil results attendant upon mixed or disparate marriages. While they confirm the warnings of the Church and vindicate, at least in part, the existence of the impediments, they do not necessarily imply insincerity or deception in the "promises" at the time when they were given. When the Church imposes the obligation upon Ordinaries and pastors to watch carefully that the "promises" will be faithfully fulfilled after the marriage has been contracted,²⁶ she does not thereby challenge the validity of her dispensations. She does seem to insinuate, however, that the neglect of this precept will spell ruin for the faith of many. May not a good number of defections be laid to the careless or injudicious fulfillment of this obligation? Is not the scarcity of priests in a missionary region a contributing factor?

234. Practically the entire argument for the absolute refusal of dispensations for mixed and disparate marriages rests on the assumption and line of reasoning that such a measure is the only possible safeguard that can be recommended to insure a respect for the law of the Church. Why not carry the argu-

²⁴ See No. 293, note 58.

²⁵ Nos. 355-364.

²⁶ Canon 1064, n. 3.

ment to its logical conclusion and upon the same line of reasoning urge the discontinuance of all matrimonial dispensations? Abuses in connection with dispensations will, indeed, foster a levity among Catholics regarding marriages with non-Catholics yet in the light of the abuses cited, the entire blame for the situation should not be laid too hastily upon the people themselves. If many of our Catholics have so little consciousness of the treasure of their faith that they have no hesitation in continuing their courtship with non-Catholics; if many of them leave the matter of the "promises" to the pastor and defer it to the time when they seek hurried dispensations; if many of them regard dispensations as a mere matter of "red tape", it hardly supports Father Woywod's assumption that they have been sufficiently instructed, or that the methods of instilling Catholic principles of life have been altogether adequate.²⁷

235. Granting, then, the existence of a certain indifference among altogether too many Catholics, may a remedy be reasonably sought in the absolute refusal of dispensations? The test appears to be too severe and hardly warranted by the practice of the Church within the last century.²⁸ While the Church *severely forbids* mixed and disparate marriages, she is not now disposed, as in bygone centuries, to refuse dispensations altogether. Ever since the Church has strictly enforced her discipline regarding the necessity of dispensations for mixed marriages among the common people, she has likewise been disposed to grant them for grave causes. Rather than lose many of her members entirely and deny legitimacy to their children she faces situations as they exist. Though reluctant to grant dispensations, she does dispense when grave causes demand it and when the divine and natural law are not in proximate danger of violation. Her norm of procedure is one of firmness yet tempered with mercy and with the recommendation that Ordinaries be not too severe and rigorous lest graver evils result. While she exhorts the Ordinaries and pastors to deter the faithful from such unions as far as possible, she does admit that it is not always possible, and rather than cause greater evils by an ab-

²⁷ Cf. *HPR*, XXVIII (1928), 705.

²⁸ This opinion implies no brief whatever for mixed marriages.

solite refusal of dispensations, she dispenses." To the Bishops of the United States and of other countries she has granted faculties that are more extensive than ever,—including even the *sanatio in radice* for mixed and disparate marriages contracted civilly or before a non-Catholic minister, in cases where the consent perseveres but where the non-Catholic refuses to renew it or to give the "promises". This does not indicate a disposition of the Church to refuse dispensations altogether.

236. Does the recommendation for the absolute refusal of dispensations include also those cases where a marriage has already been contracted civilly, and where the Catholic party has given signs of repentance, but where a separation is practically impossible? The rigor manifested in an affirmative answer hardly finds justification in the attitude of the Church." Yet if exceptions be made for such cases would it not be advisable to permit antecedent exceptions that are recognized as justified in the Code itself? Does the Church prefer to dispense for grave reasons antecedently to a marriage or does she prefer to validate an invalid marriage whose invalidity and consequent sinfulness could have been prevented by an antecedent dispensation?

ART. IV. NECESSITY OF DISPENSATION

237. Before a person who is an actual professed member of the Catholic Church may lawfully marry one who is a member of an heretical or schismatic sect, he must obtain a dispensation from the impediment of Mixed Religion. The necessity of dispensation follows from what has already been said regarding the fundamental elements of the Church's law on mixed and disparate marriages.²⁰ Apart from the prohibitions of the divine and natural law to such marriages, the Church has reasons of her own that determine her legislation. The Church must, therefore, first dispense from her law before a Catholic may contract a mixed marriage. Moreover, with reference to the divine and natural law, the Church alone has the right of giving an authentic declaration as to the absence of the prohibition in a particular

²⁰ Cf. canon 1064, nn. 1-2; Pius VIII, litt ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482; Vlaming, *Prael, Iuris Matr.*, n. 231 bis.

²¹ See No. 284, note 26. Cf. *HPR*, XXVIII (1928), 1217-1218.

²² See Chapter VII.

case.²²⁸ The necessity of dispensation from the impediment of Disparity of Cult scarcely needs explanation for, since the impediment is diriment by the law of the Church, a dispensation is clearly necessary for the very validity of a marriage between a person bound by the impediment and one who is not baptized.²²⁹

§ I. NECESSITY OF THE ORDINARY'S PERMISSION FOR THE
PASTOR TO ASSIST AT MARRIAGES PROHIBITED
BY CANONS 1065 AND 1066

238. A pastor may not assist at the marriages of Catholics with those who have notoriously left the Faith or joined condemned societies unless he has first consulted the Ordinary.²³⁰ Again if a public sinner or one notoriously under censure refuses to go to confession beforehand, or to be reconciled with the Church, the pastor may not assist at his marriage unless a grave cause urges, about which he shall if possible consult the Ordinary.²³¹ Both canons 1065, § 2, and 1066 require a *permission* of the Ordinary, not a dispensation. The obligation of recourse, moreover, rests primarily upon the pastor, not upon the contracting parties, though the given or refused permission does, indeed, affect the parties themselves.

²²⁸ Cf. canons 1038; 21; Reiffenstuel, *Jus Can. Univ.*, Lib. IV, Tit. I, n. 362; Laemmer, *Instit. des kath. Kirchenrechts*, p. 517, not. 4; De Smet, *De Spons. et Matr.*, nn. 502-503; Cappello, *De Sacram.*, III, nn. 307, 425; Farrugia, *De Matr.*, n. 131.

²²⁹ Though the impediment *per se* does not directly bind the unbaptized, indirectly it does, for those who are bound by the impediment are prevented from contracting a valid marriage with the unbaptized. The contract of marriage cannot limp.—“... cum matrimonium sit quaedam relatio, et non possit innasci relatio in uno extremorum, sine hoc quod fiat in alio, ideo quidquid impedit matrimonium in uno, impedit ipsum in altero . . . et ideo dicitur communiter, quod ‘matrimonium non claudicat’.”—Thomas Aq., *Summa Theol.*, IIIa, suppl., q. 47, art. 4. Since the very terms and nature of the impediment forbid that the direct exemption of the unbaptized pass to those bound by the impediment, it follows that a dispensation is necessary for the validity of the marriage.

²³⁰ Cf. Canon 1065, § 2; S. C. S. Off. (Portus Aloisii), 1 Aug. 1855.—*Fontes*, n. 932; (Leodien.), 30 Jan. 1867.—*Fontes*, n. 998; 17 Sept. 1871.—*AkKR*, XXVII (1872), CLXXI; (S. Bonifacii), 23 Apr. 1873.—*Fontes*, n. 1026; instr. (ad Ordinarios Imperii Brasil.), 2 Jul. 1878.—*Fontes*, n. 1056; 25 Maii 1897.—*Fontes*, n. 1186; 11 Jan. 1899.—*Fontes*, n. 1215; S. C. Conc., 27 Nov. 1896.—*AkKR*, LXXVIII (1898), 523-524; S. Poenit., 10 Dec. 1860.—Feije, *De Imped. et Dispens.*, n. 277.

²³¹ Canon 1066.

239. The duty of recourse to the Ordinary is apparently of graver moment in canon 1065, § 2, than in canon 1066. Canon 1065, § 2, directs that a pastor may not assist at the marriages of those who have notoriously rejected the Faith or joined condemned societies except after consulting the Ordinary to whom is reserved the ultimate decision, whereas canon 1066 states that a pastor may not assist at the marriage of a public sinner or one notoriously under censure unless for a grave cause, concerning which he should if possible consult the Ordinary. It is altogether reasonable to assume that the obligation of recourse would be graver in canon 1065, § 2, than in canon 1066, for in the former case the Ordinary must regard not only the gravity of the cause but also all the attendant circumstances, and especially the sufficiency of provision regarding the Catholic education of the children and the absence of a danger of perversion for the Catholic party.⁶⁶ Whatever proportions of gravity may be recognized between the prohibitions of canon 1065 and those of canon 1066, or in reference to the actual wording of these canons, or in the gravity of the matter requiring decision, it is the Ordinary and not the pastor who is to give the ultimate decision or permission.⁶⁷

⁶⁶ A decision of the Holy Office of August 21, 1861 (*Fontes*, n. 967) did not seem, however, to recognize a proportion of gravity when it directed: "Quoad assistentiam matrimoniis eorum qui pertinent ad societatem liberorum muratorum parochi et missionarii se gerant uti cum agitur de praestanda assistentia matrimoniis eorum qui tamquam publici peccatores habentur." But see S. C. S. Off. (Leodien.), 30 Jan. 1867,—*Fontes*, n. 998. Yet the decisions of the latter half of the nineteenth century continually refer to the fact that the Holy See had not yet established a fixed discipline for such cases. In two decisions the pastor appears to be given the liberty of forming his own judgment. Cf. S. C. S. Off. (Marysville), 21 Aug. 1861,—*Fontes*, n. 967; (Bombay), 21 Feb. 1883,—*Fontes*, n. 1079. A decision of the Holy Office of January 11, 1899 (*Fontes*, n. 1215) extended the faculty given to a particular Ordinary in an earlier decision of January 30, 1867 (*Fontes*, n. 998) to all Ordinaries. Indirectly, at least, this decision implied the consequent necessity of the pastor's recourse to the Ordinary before assisting at the marriages of Catholics with those who had fallen away from the Faith, or who had joined condemned societies.

⁶⁷ Exception is to be made, of course, for situations such as those postulated in canons 1044 and 1045. If by virtue of these canons a pastor may dispense from impediments, *a fortiori* he may, when all the required conditions are fulfilled, assist at such marriages as are prohibited in canons 1065 and 1066. He should, however, inform the Ordinary of the contracted marriage. Cf. Cappello, *De Sacram.*, III, n. 331.

§ II. VINDICTIVE PUNISHMENT OF CANON 2375

CANON 2375

Catholici qui matrimonium mixtum, etsi validum, sine Ecclesiae dispensatione inire ausi fuerint, ipso facto ab actibus legitimis ecclesiasticis et Sacramentalibus exclusi manent, donec ab Ordinario dispensationem obtinuerint.

240. This vindictive punishment, as it is evident from the wording of the canon, falls upon the Catholic party alone. The primary purpose of every vindictive punishment is the expiation of the crime committed.³⁹ In this it differs from a censure which is a medicinal punishment intended for the reformation of the delinquent.⁴⁰

The words "*ausi fuerint*" imply that in order to incur the punishment, the *delictum* must be committed with a full knowledge of both the law requiring the dispensation from the impediment, and of the punishment inflicted *ipso facto* upon its violation. Such elements as grave fear, ignorance (even crass and supine) that is not affected, and any lessening of imputability will grant exemption from the punishment.⁴¹ Catholics incur the penalty who dare to enter a *matrimonium mixtum* without a dispensation even though the marriage be valid. There is some disagreement among the authors as to whether the term "*matrimonium mixtum*" is generic, including both mixed and disparate marriages, or whether it is specific, designating only marriages contracted with the impediment of Mixed Religion. Blat,⁴² Vermeersch-Creusen,⁴³ Augustine,⁴⁴ Ayrinhac,⁴⁵ and Murphy,⁴⁶

³⁹ Cf. canon 2286. With reference to the punishment of canon 2375, Cerato suggests a special reason: "Et haec suspensio sancita est profecto etiam ut facilius valeat Ordinarius cautiones de iure statuta exigere ad bonum sive prolis sive ipsius coniugis."—*Matr.*, n. 54, adn. e.

⁴⁰ See canons 2241, § 1; 2248, § 2.

⁴¹ Cf. canon 2229; Cappello, *De Sacram.*, III, n. 321; Cocchi, *Comment.*, Vol. 8, n. 249; Cerato, *Censurae*, nn. 135, 30; Leitner, *Lehrb. des kath. Ehe-rechts*, p. 243-244.

⁴² *Comment.*, Vol. V, n. 217.

⁴³ *Epitome*, III, n. 578.

⁴⁴ *Commentary*, VIII, p. 452.

⁴⁵ *Penal Legislation*, p. 337.

⁴⁶ *Delinquencies and Penalties*, p. 107-108.

limit the term to strictly mixed marriages, whereas Chelodi⁴⁸ and Leitner⁴⁹ extend it likewise to disparate marriages.

241. The historical use of the term "*matrimonium mixtum*" offers no apparent clue to the solution.⁵⁰ Reasons drawn from the purpose of the canon would seem to favor the inclusion of disparate marriages, for why should a Catholic attempting a disparate marriage be dealt with less severely than a Catholic attempting to enter without dispensation either a valid or an invalid mixed marriage?⁵¹ There is a positive element of doubt, however, and accordingly the strict interpretation of the term "*matrimonium mixtum*", as referring only to mixed marriages, may be followed. This opinion, moreover, has found favor among the greater number of canonists.

242. The punishment in its form of an exclusion from legitimate ecclesiastical acts and the sacramentals is new.⁵² The

⁴⁸ *Ius Poenale*, n. 96.

⁴⁹ *Lehrb. des kath. Eherechts*, p. 243-244.

⁵⁰ See No. 26. In the index to Cardinal Gasparri's edition of the Code, the term seems to refer to the marriages of Catholics with baptized members of non-Catholic sects.

⁵¹ If Cerato's opinion may be accepted as a partial reason for the punishment (see No. 240, note 38), the inclusion of disparate marriages receives added confirmation. Murphy (*loc. cit.*) argues that since the canon is under the title treating of the crimes committed in the administration and reception of the sacraments, and since the punishment is limited to those mixed marriages that are validly [?] contracted, the inclusion of disparate marriages contracted without dispensation must be rejected. But the words "*etsi validum*" seem to insinuate that both valid and invalid "*matrimonia mixta*" are included.

⁵² Cf. Chelodi, *Ius Poenale*, n. 96. The same author adds that in the pre-Code law such offenders were regarded as public sinners. Cardinal Albitius (*De Inconstantia in Fide*, Cap. XXXVI, nn. 185-197) dwells at considerable length upon the grounds whereby such delinquents would incur censures. Heiner (*Grundriss des kath. Eherechts*, Teil III, absch. I, cap. V, n. 7) likewise regarded them as public sinners under excommunication. Cf. Feije, *De Imped. et Dispens.*, n. 573. The opinion more clearly supported by the sources is given by Wernz (*Ius Decret.*, IV, n. 581 [see also n. 587]): "*Catholici quamvis in contrahendis matrimoniis mixtis sine legitima dispensatione obtenta grave delictum committant, tamen ex iure communi ob solam matrimonii mixti celebrationem non subiiciuntur poenis ecclesiasticis sive ipso facto incurrendis sive per sententiam infligendis. At Episcopus pro sua iure decernere potest poenas latae vel ferendae sententiae, dummodo prudenti utatur moderatione. Nam compluries Sedes Apostolica censuit in huiusmodi casibus 'potius per exhortationes quam edictis poenalibus praesertim excommunicationibus' esse procedendum.*" Cf. Urbanus VIII., 14 Mart. 1630.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 712; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; S. C. S. Off., litt., 23 Aug. 1877.—*Fontes*, n. 1052; (Engolismen.), 27 Mart. 1878.—*Coll.*, n. 1490; S. C. de

list of legitimate ecclesiastical acts is given in canon 2256, n. 2, of which sponsorship at Baptism and Confirmation will be of more usual concern. Murphy⁶¹ apparently accepts Blat's⁶² observation that the exclusion from the sacramentals refers only to those sacramentals which consist of actions and not those which are things (*res*), e. g., holy water.⁶³ Does this exclusion refer to validity or liceity? Concerning sponsorship at Baptism and Confirmation, canons 765, n. 2,⁶⁴ and 795, n. 2,⁶⁵ prescribe that those who can validly act as sponsors must not be excluded from legitimate acts by a condemnatory or declaratory sentence. For liceity or lawfulness, canons 766, n. 2, and 796, n. 3, demand that sponsors be not excluded from legitimate acts. With reference to the punishment of canon 2375, it may be said that unless the exclusion from legitimate ecclesiastical acts has been incurred by a declaratory sentence, those laboring under the *ipso facto* exclusion will act illicitly but validly in the capacity of sponsors at Baptism and Confirmation. As to the exclusion from the Sacramentals, since there is no mention of the invalidity of their reception,⁶⁶ the reception seems to be valid though illicit.⁶⁷

Prop. F., an. 1638.—Ballerini-Palmieri, *loc. cit.* A later decree of the Holy Office admonishes the Apostolic Vicar of Bombay to instruct his priests: "... ne coniuges, que de suo matrimonio mixto clandestine inito dolentes et poenitentes reconciliari Deo desiderant, monere omittant de necessitate obtinendi ab Episcopo dispensationem, ut matrimonio suo, valide quidem sed illicite contracto, in posterum uti licite valeant."—S. C. S. Off., 12 Mart. 1881,—*NRT*, XV (1883), 121-122. It is not said what is to be dispensed from though there is a suggestion as to the necessity of a dispensation from the impediment itself.

⁶¹ *Delinquencies and Penalties*, p. 108.

⁶² *Comment.*, Vol. V, n. 217.

⁶³ "Privatio Sacramentalium—citari possint benedictio domus; benedictio mulieris gravidæ vel matris post tempus purgationis; benedictio agrorum [?]; aspersio aquæ lustralis [?]."—Vermeersch-Creusen, *Epitome*, III, n. 492.

⁶⁴ "Ut quis sit patrinus, oportet:—Ad nullam pertineat hæreticam aut schismaticam sectam, nec sententia condemnatoria vel declaratoria sit excommunicatus aut infamis infamia iuris aut exclusus ab actibus legitimis, nec sit clericus depositus vel degradatus."—Canon 765, n. 2.

⁶⁵ "Ut quis sit patrinus, oportet:—Nulli hæreticæ aut schismaticæ sectæ adscriptus, nec ulla ex poenis de quibus in can. 765, n. 2 per sententiam declaratoriam aut condemnatoriam notatus."—Canon 795, n. 2.

⁶⁶ See canon 2291, n. 6.

⁶⁷ An argument analogous to that employed by Pashang (*The Sacramentals according to the Code of Canon Law*, Washington, 1925, p. 74) may be used here. His argument centers on canon 2260 which excludes those excommunicated by a condemnatory or declaratory sentence from their reception. He urges that even in this instance the favorable interpretation may be employed.

243. Though the penalty is incurred only by those who *dared* to contract the *matrimonium mixtum* without a dispensation, the remission of the penalty is not dependent upon the cessation of the contumacy.⁵⁸ Moreover, a *dispensation* from the penalty is required, not an absolution.⁵⁹ The dispensation is to be sought from the Ordinary and since it implies an act of jurisdiction the norms of canon 94 should be followed.⁶⁰ The dispensation is from the *penalty*, not from the impediment. It should not be given until the scandal has been repaired, and the *cautiones* given at least by the Catholic party.⁶¹ Once the marriage has been contracted validly, though without dispensation (this can refer only to mixed marriages), there is no further need of the dispensation from the impediment of Mixed Religion.⁶²

ART. V. CONDITIONS REQUIRED FOR DISPENSATION

244. The Church is, indeed, reluctant to dispense from the impediments of Mixed Religion and Disparity of Cult.⁶³ Before she consents to dispense from her law in a particular case, she demands that certain conditions be fulfilled.⁶⁴ These conditions may be summarized under two principal headings: 1) the existence of just and grave causes;⁶⁵ 2) the absence of

⁵⁸ Cf. canons 2286; 2248, § 2.

⁵⁹ Cf. canon 2236, § 1.

⁶⁰ Blat, *Comment.*, Vol. V, n. 217.

⁶¹ Cf. Wernz, *Ius Decret.*, IV, n. 587; Chelodi, *Ius Matr.*, n. 63; Wernz-Vidal, *Ius Canonicum*, V, n. 180; Urbanus VIII, 14 Mart. 1630.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 712; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; S. C. S. Off., litt., 23 Aug. 1877.—*Fontes*, n. 1052.

⁶² See the preceding note.

⁶³ The Church is more disposed to dispense from other impediments such as consanguinity and affinity in order that a Catholic may marry a Catholic. Cf. S. C. S. Off., 12 Ian. 1769, n. I.—*Fontes*, n. 822; Gasparri, *De Matr.*, n. 707; Petrovits, *New Church Law on Matrimony*, n. 253. See *infra* No. 86, note 22.

⁶⁴ The conditions for dispensation are practically the same for both impediments. Cf. Cerato, *Matr.*, n. 17; Ayrinhac, *Marriage Legislation*, p. 153.

⁶⁵ Clement IX, 23 Ian. 1669.—Perrone, *De Matr.*, Tom II, cap. VII, art. 2 (quoted in No. 77, note 1); Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830.—*Fontes*, n. 482; Gregorius XVI, ep. encycl. *Summo iugiter*, 27 Maii 1832, § 1.—*Fontes*, n. 484; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 2.—*Fontes*, n. 497; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858.—*Coll.*, n. 1169; S. C. S. Off., instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5.—*Fontes*, n. 866; instr. (ad Archiep. Corcyren.), 3 Ian. 1871, nn. 3, 6.—*Fontes*, n. 1013; S. C. de Prop. F., instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760.—*Coll.*, n. 435; (C. P. pro Sin.—Sutchuen), 31 Ian. 1796.—*Coll.*, n. 629; litt. encycl. 11 Mart. 1868.—*Coll.*, n. 1324.

the proximate danger to the faith of the Catholic spouse and the assurance of the Catholic education of the children." To this latter end the Church demands that certain "*cautiones*" or "*promises*" be given to establish this assurance.

ART. VI. WHO CAN DISPENSE?

245. No one except the Roman Pontiff has the power to dispense from ecclesiastical impediments unless it has been granted him by common law or by special Apostolic Indult.⁶⁶ The repeated insistence of the Holy See that dispensations from the impediments of Mixed Religion and Disparity of Cult are reserved to itself, leaves no room for doubt on this score.⁶⁷ The right to dispense from either of the impediments is reserved to the Congregation of the Holy Office, over which the Holy Father presides as Prefect.⁶⁸ This rule must be observed even for regions subject to the Congregation of the Propaganda⁶⁹ and for those subject to the Congregation for the Oriental Church.⁷⁰

⁶⁶ Clement IX, 23 Jan. 1669.—Perrone, *loc. cit.*; Benedictus XIV, 15 Feb. 1756.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 707; S. C. S. Off., 29 Jan. 1767.—NRT, XV (1883), 423-424; (Sutchuen), 15 Dec. 1769.—*Fontes*, n. 826; instr. (ad Archiep. Corcyren.), 3 Jan. 1871, nn. 3, 6.—*Fontes*, n. 1013; S. C. de Prop. F., instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760.—*Coll.*, n. 435; (C. P. pro Sin.—Sutchuen), 31 Jan. 1769.—*Coll.*, n. 629. These references represent only a few of the earlier instructions and decisions. Most of the decisions to which reference will be made in connection with the discussion on the *cautiones* (Chapter XIII) contain the same prescription. When the condition of the absence of danger to the faith of the Catholic party (especially for women) was insisted upon for dispensation from the impediment of Disparity of Cult, it was often expressed by the clause "*si contumelia Creatoris abest.*" Cf. Clement IX, 23 Jan. 1669.—Perrone, *loc. cit.*; Benedictus XIV, 15 Feb. 1756.—Ballerini-Palmieri, *loc. cit.*; S. C. S. Off. (Sutchuen.), 15 Feb. 1780.—*Fontes*, n. 840; S. C. de Prop. F., instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760.—*Coll.*, n. 435; (C. P. pro Sin.—Sutchuen), 31 Jan. 1796.—*Coll.*, n. 629; Gasparri, *De Matr.*, nn. 698, 700. The present faculties to dispense from this impediment, given to the Bishops of the United States, also have this clause. The terminology and connotation were evidently borrowed from a usage in connection with the Pauline Privilege. The term appears likewise to have comprised the freedom from the danger of polygamy. Cf. Wernz, *Ius Decret.*, IV, n. 510, not. 40; De Smet, *De Spons. et Matr.*, p. 517, not. 1; Konings-Putzer, *Comment. in Facult.*, p. 380.

⁶⁷ Cf. canons 1040; 80-81.

⁶⁸ See No. 80, note 11; No. 81, note 14; No. 104, notes 52-54.

⁶⁹ Cf. canon 247, § 3.

⁷⁰ Canon 252, § 2.

⁷¹ Cf. canon 257, § 2. "In practice if Latin Ordinaries require faculties to issue dispensations in favor of their Oriental subjects they must apply to

246. By common law, Ordinaries can dispense from these impediments in particular cases if recourse to the Holy Office is difficult and if there be danger of grave impending evil in the delay.⁷⁵ Ordinaries may likewise dispense from these impediments when urgent danger of death necessitates the adjustment of matters of conscience, and should the case call for it, the legitimation of offspring.⁷⁶ In the same circumstances, pastors and those assisting at marriages by virtue of canon 1098, n. 2, who cannot approach the Ordinary, also enjoy this faculty by common law. The opinion that confessors in the same circumstances can validly dispense from these impediments in question for the internal forum and "*in actu sacramentalis confessionis tantum*" may, it appears, be accepted as probable.⁷⁷

247. Having due regard for the "*clausulae*" at the end of canon 1043, Ordinaries can dispense also in cases where one of these impediments would be discovered after everything is ready for the marriage and the ceremony cannot be delayed without probable danger of grave evil until a dispensation is obtained from the Holy Office.⁷⁸ A probable opinion also holds that in like circumstances all those who are given the faculty to dispense in canon 1044 (the confessor only within the conditions postulated) may also dispense from such impediments as Mixed Religion and Disparity of Cult, provided that *the case is occult*.⁷⁹

the Oriental Congregation . . . Even for dispensations reserved to the Holy Office, proper procedure seems to demand the intervention of the Oriental Congregation which will obtain the required faculty from the Holy Office or the concession of the requested dispensation."—Duskie, *The Canonical Status of the Orientals in the United States*, p. 179.

⁷⁵ See canon 81. These two impediments are among those from which the Holy See is wont to dispense.

⁷⁶ Canon 1043. It is scarcely within the scope of the present study to discuss all the requirements of canons 1043-1045. The requirement of the *cautiones* will be discussed in Chapter XIII.

⁷⁷ Cf. O'Keeffe, *Matrimonial Dispensations*, p. 118-124; Kelly, *The Jurisdiction of the Simple Confessor*, p. 84-85. "In practice he need not, and should not dispense from them [impediments public in nature and in fact] *qua confessor*. He should urge or even *command* the penitent to manifest the public impediment to him *qua sacerdos* outside the tribunal of penance, and then dispense by virtue of canon 1098, n. 2 . . ."—O'Keeffe, *op. cit.*, p. 124.

⁷⁸ Canon 1045, § 1.

⁷⁹ Though the impediments of Mixed Religion and Disparity of Cult are by their nature public impediments, they are, nevertheless, comprised in the

248. Those who have received the delegated faculties to dispense must abide by all the conditions enumerated in these faculties. The validity or liceity of dispensations will depend on the observance of the conditions imposed either for validity or liceity. Those who grant dispensations by virtue of a delegated faculty from the Holy Office must make express mention of the Indult in the dispensation.⁷⁷ This prescription regards rather the liceity than the validity of procedure.⁷⁸

§ I. FACULTIES DELEGATED TO THE BISHOPS OF THE UNITED STATES

249. The faculty to dispense from the impediment of Mixed Religion is as follows:

Dispensandi, iustis gravibusque accedentibus causis, cum subditis etiam extra territorium aut non subditis intra limites proprii territorii, super impedimento mixtae religionis, et, si casus ferat, etiam super disparitate cultus, ad cautelam; quatenus ante nuptias pars acatholica ad veram religionem adduci aut catholica ab ipsis nuptiis absterri nequiverit, dummodo prius regulariter, ad praescriptum *Cod. I. C.* can 1061, § 2, cautum omnino sit conditionibus ab Ecclesia requisitis, et *Ipse R. P. D. Ordinarius moraliter certus sit easdem impletum iri*, scilicet: ex parte nupturientis acatholici, de amovendo a parte catholica perversionis periculo, et ab utroque contrahente, de universa prole utriusque sexus in catholicae religionis sanctitate omnino baptizanda

phrase "*pro casibus occultis*". That point was apparently made clear by the Pontifical Commission for the Authentic Interpretation of the Code in the answer of December 28, 1927 to the following *dubium*: "*An verba PRO CASIBUS OCCULTIS canonis 1045 § 3 intelligenda sint tantum de impedimentis matrimonialibus natura sua et facto occultis, an etiam natura sua publicis et facto occultis. R. Negative ad primam partem, affirmative ad secundam.*"—AAS, XX (1928), 61, ad III. For a discussion among the authors as to the meaning of "*pro casibus occultis*" see D'Angelo, "In can. 1045 Codicis I. C. excursus", *Apollinaris*, I (1928), 245-262; Noldin, *Theol. Mor.*, III, n. 607; De Smet, *De Spons. et Matr.*, nn. 793-794; Cerato, *Matr.*, n. 38; Cappello, *De Sacram.*, III, n. 236, d; Farrugia, *De Matr.*, n. 87, b; Chelodi, *Ius Matr.*, n. 44; Blat, *Comment.*, Vol. III, P. I, n. 437; Wernz-Vidal, *Ius Canonicum*, V, n. 428; Hilling, *Das Eherecht des C. I. C.*, p. 68; "Studien zum Eherecht des Codex Juris Canonici", *AkKR*, CII (1922), 3-17; O'Keeffe, *Matrimonial Dispensations*, p. 161-184; Kelly, *The Jurisdiction of the Simple Confessor*, p. 179-183. It seems to be a probable opinion that the "*occultness*" of a case required by canon 1045, § 3 may be determined according to the norms accepted by the Sacred Penitentiaria.

⁷⁷ Canon 1057.

⁷⁸ S. C. S. Off. (S. Ludovici), 15 Jun. 1875,—*Fontes*, n. 1042.

et educanda: declarata insuper parti catholicae obligatione, qua teneatur, prudenter curandi conversionem coniugis ad fidem catholicam.

Nupturientes autem moneantur se, ante vel post matrimonium coram Ecclesia initum, ministrum quoque acatholicum ad matrimoniale consensum praestandum vel renovandum adire non posse, ad mentem *Cod. I. C.*, can. 1063, § 1, sub poena excommunicationis latae sententiae Ordinario reservatae a parte catholica incurrendae, iuxta can. 2319, § 1, n. 1,—strictè caeteroquin servatis quae de parochi in casu agendi ratione statuta sunt in can. 1063, § 2.

Quod si partes actu in concubinato vivant, provideatur opportunis modis ut scandalum, si adsit, removeatur, et pars catholica ad gratiam Dei recipiendam rite disponatur, *praevia eius absolutione ab excommunicatione contracta, si forte matrimonium attentatum fuerit coram ministro acatholico, eique impositis congruis poenitentiis salutaribus.*

The American Bishops also enjoy the faculty to dispense from the impediment of Disparity of Cult.

Dispensandi iustis gravibusque accedentibus causis cum subditis etiam extra territorium, aut non subditis intra limites proprii territorii super impedimento disparitatis cultus (excepto tamen casu matrimonii cum parte iudaica aut mahumetana); quatenus sine contumelia Creatoris id fieri possit et ante nuptias pars non baptizata ad veram religionem adduci aut catholica ab ipsis nuptiis absterreri nequiverit, dummodo etc.”

A. “*Cum subditis etiam extra territorium aut non subditis intra limites proprii territorii*”

250. The former restrictions expressed in such clauses as “*exceptis Italis de quibus non constat Italicum domicilium omnino deseruisse*” and that the one dispensing his subjects by delegated power might dispense only “*intra fines dioecesis*” have been abrogated.” The jurisdiction which the Ordinary enjoys over his subjects is personal and he can, therefore, dispense in their favor wherever they are. To those who are not his subjects he can issue dispensations only while they are actually within the limits of his diocese, since the jurisdiction in such cases is

” Vermeersch-Creusen, *Epitome*, II, n. 871.

” See No. 103, note 50.

territorial.⁸¹ In this connection it appears that the term "subjects" must be understood in the sense of "Catholic subjects" for dispensations are not given in favor of the non-Catholic party.⁸² The presence of non-subjects within the territory of the Ordinary dispensing seems, therefore, to be demanded only of the Catholic party to the marriage.⁸³

B. THE DISPENSATION "*mixtae religionis et ad cautelam disparitatis cultus*"

251. The questions relative to the validity of non-Catholic Baptisms have already been discussed in Chapter X.⁸⁴ The conclusions that terminated the discussion will serve also as a guide in dealing with the dispensation from the impediment of Disparity of Cult *ad cautelam*. These conclusions suppose the careful investigation (unless this becomes impossible through the circumstances of a particular case) that the Church has always demanded of Baptisms conferred in non-Catholic sects when there is question of a proposed mixed marriage.⁸⁵

252. The faculty given to Ordinaries to dispense from the impediment of Mixed Religion and *ad cautelam* from the impe-

⁸¹ Cf. Maroto, *Institutiones*, n. 309, B, b; O'Keeffe, *Matrimonial Dispensations*, p. 94, 147; Motry, *Diocesan Faculties*, p. 133. Augustine (*Rights and Duties of Ordinaries*, p. 275) writes that non-subjects must be actually residing in the territory under the jurisdiction of the one dispensing. It is well to note that no canonical residence is required, nor any specified length of residence. Mere physical presence in the territory is sufficient, though necessary, for the validity of dispensations granted in favor of non-subjects.

⁸² See No. 289, note 46.

⁸³ Chelodi (*Ius Matr.*, n. 59) and Cappello (*De Sacram.*, III, n. 313) state that the Ordinary of the Catholic party is the one competent to dispense. Should the Catholic party, however, be within the territorial limits of another diocese, either the Ordinary of that diocese (on the supposition that he has the faculty to dispense non-subjects) or the Catholic party's own Ordinary are competent to dispense.

⁸⁴ See Nos. 191-200.

⁸⁵ "Fertur insuper saepe non recte applicari principium, vi cuius baptismus dubius habendus est ut validus in ordine ad validitatem matrimonii. Contingit enim sacerdotem, cui incumbit inquirere utrum pars acatholica fuerit baptizata necne, totam suam inquisitionem limitare interrogationi factae parti acatholicae, utrum ipsa fuerit baptizata. Si haec respondit affirmative, nullo requisito documento aut probatione, habetur ut baptizata, et petita tantum dispensatione ab impedimento mixtae religionis, celebrantur nuptiae. Unde fit plura matrimonia sic contracta esse irrita propter impedimentum disparitatis cultus, quia pars acatholica non fuit baptizata, licet id affirmaverit."—Extract from a letter sent by Cardinal Ledochowski to Cardinal Gibbons on August 2, 1901.—ASS, XXXIV (1901-1902), 640.

diment of Disparity of Cult, is an apparent departure from the discipline established by the Holy See in the law before the Code.²⁵ Perhaps the underlying reason for the change is not yet clearly discernible. A very probable reason, however, is the fact that it is becoming increasingly difficult to arrive at the presumptions recognized by the Holy See, especially in those cases where there is only indirect evidence for the very fact of Baptism. This difficulty does not absolve from the necessity of making those investigations that are possible, but the faculty given to the Bishops to dispense *ad cautelam* from the impediment of Disparity of Cult, does seem to take cognizance of the fact that the results of such investigations are often quite unsatisfactory, and that at best they result in leaving the fact of the administration, or of its validity, in a very doubtful state.

253. Whenever, therefore, after due investigation, the fact of a Baptism or its validity conferred in a non-Catholic sect remains doubtful, the dispensation "*mixtae religionis et ad cautelam disparitatis cultus*" should be given rather than that of Mixed Religion alone. Whether the Baptism be doubtful on the score of a *dubium facti* or of a *dubium iuris* is immaterial, for in either event it will resolve itself into a *dubium facti* of the impediment of Disparity of Cult. The faculty to dispense *ad cautelam* may be employed only "*si casus ferat*", thus forbidding its indiscriminate use. It is reasonable to assume, however, that where the case demands it ("*si casus ferat*") the Holy See wishes the Ordinary to dispense from the impediment of Disparity of Cult *ad cautelam*, in addition to the dispensation from the impediment of Mixed Religion. This norm of procedure has the support of many canonists.²⁶

A case may readily arise where a pastor may petition for permission to assist at the marriage of a Catholic with a non-

²⁵ The rule of refusing to dispense *ad cautelam* from the impediment of Disparity of Cult does not appear, however, to have been absolute. See *infra* No. 207.

²⁶ Cappello, *De Sacram.*, III, n. 419, d; Wernz-Vidal, *Ius Canonicum*, V, n. 268; De Smet, *De Spons. et Matr.*, n. 588; Farrugia, *De Matr.*, n. 171; Augustine, *Commentary*, V, p. 186; Durieux, *The Busy Pastor's Book on Matrimony*, p. 79, note 101; Woywod, *A Practical Commentary*, I, n. 1054; Genicot-Salsmans, *Theol. Mor.*, II, nn. 481, 492; Vermeersch, *Theol. Mor.*, III, n. 779; Petrovits, *New Church Law on Matrimony*, n. 239; Ojetti, *Commentarium*, I, p. 126.

Catholic who has formally renounced his membership in the sect in which his Baptism was of doubtful validity. If the non-Catholic has joined no other sect, permission may be given to the priest to assist (provided the requisite conditions have been fulfilled), and a dispensation given from the impediment of Disparity of Cult by virtue of canon 15. It is quite evident that on no condition shall a non-Catholic, whose Baptism is doubtful, receive conditional Baptism in the Catholic Church unless there be a conversion to the Catholic Faith."⁸⁸

C. "*Excepto tamen casu matrimonii cum parte iudaica aut mahumetana*"

254. The Church has always been more severe in her attitude towards the marriages of Catholics with Jews and Mohammedans, than with those of other non-Catholic or pagan sects, and this discipline is based largely upon a presumption of a greater danger to the faith of the Catholic party and of the children. In fact, this presumption appears to have served as the primary impetus in the development of a diriment impediment to the marriages of Catholics with aliens to the Faith. In all probability the impediment of Disparity of Cult began as an impediment to the marriages of Catholics with Jews."⁸⁹ Even in modern times the presumption of a greater danger to the Faith in marriages of Catholics with Jews still prevails, for the Jews are more tenacious of their beliefs than most other non-Catholic denominations. The same may be said of Mohammedans. The history of Mohammedanism is that of greatest antagonism to everything Christian. Conversions from Mohammedanism are of the rarest occurrence. Moreover there is a grave danger of polygamous unions. The accentuated severity of the Church is, therefore, clearly justified.

255. The restriction of the faculty to dispense for marriages of Catholics with Jews existed also in former faculties given to the Bishops of the United States, as, for example in formulae "D" and "T". Formula "D", art. III, in granting the faculty to dispense from the impediment of Disparity of

⁸⁸ See No. 215, note 78.

⁸⁹ See Nos. 58-59.

Cult, stated the restriction in much the same way as in the present faculty: "*excepto tamen casu matrimonii cum viro vel muliere iudaeis nisi adsit periculum in mora.*"⁸⁰

256. A controversy exists among the authors on the point as to who is to be considered a Jew. Some⁸¹ are of the opinion that a distinction is to be made between Orthodox and Reformed Jews, and that the Reformed Jews are not included in the restriction "*cum parte iudaica*" (or as it appears in the older faculties,—"*cum viro vel muliere iudaeis*"), since they no longer adhere to the practice of circumcision, and to many of the beliefs of Orthodox Judaism.⁸² Others⁸³ refuse to accept the distinction and insist that even those professing Reformed Judaism must be included in the restriction,—"*cum parte iudaica*". Strangely enough, the same decisions are used to support both contentions. It will be well, therefore, to examine them anew. The one most frequently employed is as follows:

Nella Congregazione di feria V. 3 corrente, proposto il quesito di N. N., in qual conto, trattandosi di dispense matrimoniali, debbano tenersi quegli ebrei che non osservano punto le pratiche della loro religione, anzi i più non sono neppure circoncisi, gli Eminentissimi Cardinali Inquisitori Generali hanno decretato:

Respondeatur in usu Formulae D. n. 3 de Propaganda Fide: *Hebraeos de quibus agitur non esse excipiendos.*⁸⁴

257. The neglect of circumcision and the non-observance of the practice of the Jewish religion mentioned in the *dubium*, is the line of demarcation urged by the authors between Orthodox and Reformed Judaism. The answer "*Hebraeos de quibus*

⁸⁰ Konings-Putzer, *Comment. in Facult.*, p. 379.

⁸¹ Wernz, *Ius Decret.*, IV, n. 510, not. 36; Sabetti-Barrett, *Theol. Mor.*, n. 881; Rock, "Disparity of Worship", *Catholic Encyclopedia*, V, 40.

⁸² For a summary of the principal beliefs of both Orthodox and Reformed Judaism, see Gigot, "Jews and Judaism", *Catholic Encyclopedia*, VIII, 402-403.

⁸³ Konings-Putzer, *op. cit.*, p. 380; *AER*, IV (1891), 88-90; Nilles, "Exceptis Italis et Hebraeis", *ZkT*, XV (1891), 390. The language of the latter author is a bit vague, though he seems to follow the stricter interpretation.

⁸⁴ S. C. S. Off., 5 Apr. 1889.—*AER*, IV (1891), 90. The same decision was given by the Holy Office on August 3, 1889,—*ZkT*, XV (1891), 390.

agitur non esse excipiendos' is interesting in that it may lend itself to two entirely opposite interpretations. It may mean that those Jews who come under the description in the *dubium* are not to be excepted from the term "*iudaeis*" in formula *D*, n. 3, or it may mean that they are not to be an exception to the normal use of the faculty in dispensing from the impediment of Disparity of Cult.

258. Another decision of the Holy Office given on July 12, 1882, is to the following effect:

In facultate extraordinaria *D* sic legitur: *Dispensandi cum suis subditis . . . , excepto . . . casu matrimonii cum viro vel muliere iudaeis, super impedimento disparitatis cultus.*

Nunc: 1. Si quis ex familia iudaica ortus qui non circumcisis neque umquam iudaismum professus est, cupiat cum catholica matrimonium inire, subiicitur ne hic illi clausulae *excepto insuper casu matrimonii cum viro vel muliere iudaeis*? Aliis verbis: an dispensatio super impedimento disparitatis cultus contrahentibus potest concedi iuxta hunc n. 3 Extra *D*. In casu negativo suppliciter rogo dispensationem super impedimento disparitatis cultus inter catholicam et virum ex parentibus iudaeis natum.—2. Si quis e patre iudaeo et matre infideli vel haeretica natus, qui incircumcisis et nunquam iudaismum professus est desideret in matrimonium ducere catholicam, possuntne contrahentes in hoc casu dispensari super impedimento disparitatis cultus sine respectu interpositionis *excepto insuper casu matrimonii cum viro vel muliere iudaeis*? Si in hoc casu dispensatio super iudaismo opus sit, petam suppliciter hanc dispensationem.

R. Vi numeri III Facultatum concedi posse dispensationem super impedimento disparitatis cultus in casibus superius expositis, facto verbo cum SSmo.—SSmus benigne annuit pro praefata declaratione et extensione facultatum, durante indulto iam obtento.²⁵

Wernz²⁶ argues that this decision is to be understood in the sense that Reformed Jews are not to be excepted from the faculty of dispensing from the impediment of Disparity of Cult, and his interpretation seems to be justified. It is well to note, however, that the reply is particular in its nature and cannot be urged as a general principle of interpretation for the present faculties. The limitation is clearly expressed in the last sentence:

²⁵ Coll., n. 1572.

²⁶ *Ius Decret.*, IV, n. 510, note 36.

"*SSmus benigne annuit pro praefata declaratione et extensione facultatum, DURANTE INDULTO IAM OBTEUTO.*" Moreover, even at the time the last edition of Wernz was printed (1912), formula *D* was supplanted by formula *T* (in 1907) and his interpretation can scarcely be accepted as a general principle."

259. Whatever limitations or extensions the foregoing decisions represent, it is but reasonable to assume that the restriction of the faculty is directed rather at the Jewish religion than at the nationality. It would be absurd to maintain that a Catholic could not marry a Catholic who is a Jew by nationality, or that in the term "*cum parte iudaica*" are to be included those who have become members of Christian religious denominations, even such as do not administer Baptism (e. g., the Quakers). On the other hand the distinction between Orthodox and Reformed Judaism is not decisively warranted by the decisions in the use of the faculty for the Reformed Jews, nor is it a safe guide to follow in practice. Reformed Judaism may, indeed, have departed in many respects from the tenets and practices of Orthodox Judaism,—still it is Judaism and a professed adherent is apparently comprised in the term "*cum parte iudaica*". The faculty, therefore, to dispense from the impediment of Disparity of Cult excludes those cases where the unbaptized party is a professed member of Orthodox Judaism, Reformed Judaism, or Mohammedanism.

260. Having in mind the basis of the limitation of the faculty to dispense from the impediment of Disparity of Cult, it seems but a logical conclusion to urge the same restriction upon the faculty to dispense from the impediment of Mixed Religion should the baptized non-Catholic be a professed member of Judaism or Mohammedanism. The restriction, as it is inserted in the faculty, to dispense from the impediment of

"The doubtful value of Wernz's interpretation to serve as a general norm is exemplified in the following decision sent to Archbishop Elder of Cincinnati: ". . . Alterum dubium erat num non obstante speciali clausula de iudaeis in facultatibus quas habes, recte dispensaveris nonnumquam cum mulieribus catholicis ut inire possent matrimonium cum iudaeis, qui cupientes huiusmodi nuptias contrahere in scriptis iudaismo renuntiaverint. R. Quod ad praeteritum, supplicandum Sanctissimo pro Sanatione in radice, quatenus opus sit (quibus precibus Summus Pontifex annuit). Quod ad futurum, recurat (Ordinarius) in singulis casibus, expositis omnibus circumstantiis."—S. C. S. Off., 20 Jun. 1892, ad II.—ASS, XXX (1897-1898), 383-384.

Disparity of Cult does not turn on the fact of the absence of Baptism, but on the presumption of a greater danger to the Faith. The same presumption would, therefore, seem to urge in either case.

261. The former modification "*nisi adsit periculum in mora*" is not explicitly mentioned in the present faculties; nevertheless, if there were danger of grave evil in delay, and time would not permit recourse to the Holy See or the Apostolic Delegate,²⁶ the Ordinary could dispense by virtue of canon 81. If he does dispense in such circumstances he must have regard for the following conditions: 1) that there be no danger of polygamy; 2) that there will be no danger that the offspring will have to undergo the *rite* of circumcision;²⁷ 3) that in those places where a civil ceremony must take place it must be of a strictly civil nature, without any invocations to Allah, and without the least semblance of superstition.

D. THE *Sanatio in Radice*

262. Recourse to the *sanatio in radice* is the last resort at the disposal of American Bishops in validating mixed or disparate marriages attempted before a civil magistrate or a non-Catholic minister. If the parties living in an invalid union cannot be induced to separate, or if this will bring about even greater evils, the normal resort is to simple convalidation in which the following manner of procedure must be observed: 1) The *cautiones* are to be given by both the Catholic and the non-Catholic party. 2) If the Catholic party has incurred the censure of excommunication (reserved to the Ordinary) because of an attempted marriage before a non-Catholic minister ("*uti sacris addictum*"), the absolution from this censure must be obtained. 3) The dispensation from the impediment of Mixed Religion or Disparity of Cult must be obtained before the pastor can witness the necessary renewal of consent in the

²⁶ The Apostolic Delegate apparently enjoys the faculty. Cf. Vermeersch-Creusen, *Epitome*, I, n. 813.

²⁷ The reference is to circumcision as a *religious rite* and not as a prophylactic measure. Cf. Winslow, *Vicars and Prefects Apostolic*, p. 107-108; Vermeersch, *De Form. Facult. S. C. de Prop. F.*, n. 92.

form demanded by the Church.¹⁰⁰ When, however, the matrimonial consent (which must continue to persevere) cannot be renewed, either because the non-Catholic party cannot be advised of the invalidity of the marriage without grave danger to the Catholic party, or because the non-Catholic party cannot be induced to renew his consent in the form prescribed by the Church, or because he refuses to give the *cautiones*, there can be no question of simple convalidation, and the only recourse remains in the *sanatio in radice*.¹⁰¹

263. The faculty given to the Bishops of the United States is as follows:

Sanandi in radice matrimonia attentata coram officiali civili vel ministro acatholico a suis subditis, etiam extra territorium, aut non subditis, intra limites proprii territorii, cum impedimento mixtae religionis aut disparitatis cultus, dummodo consensus in utroque coniuge perseveret, isque legitime renovari non possit, sive quia pars acatholica de invaliditate matrimonii moneri nequeat sine periculo gravis damni aut incommodi a catholico coniuge subeundi; sive quia pars acatholica ad renovandum coram Ecclesia matrimonialem consensum, aut ad cautiones praestandas, ad praescriptum *Cod. I. C.*, can. 1061, § 2, ullo modo induci nequeat; dummodo aliud non obstet canonicum impedimentum dirimens, super quo ipse dispensandi aut sanandi facultate non polleat.

Ipse autem R. P. D. Ordinarius serio moneat partem catholicam de gravissimo patrato scelere, salutare ei poenitentias imponat, et si casus ferat, eum ab excommunicatione absolvat iuxta *Cod. I. C.*, can. 2319, § 1, n. 1, simulque declaret ob sanationis gratiam a se acceptatam, matrimonium effectum esse validum, legitimum et indissolubile iure divino et prolem forte susceptam vel suscipiendam legitimam esse; eique insuper gravibus verbis in mentem revocet obligationem, qua semper tenetur, pro viribus tutandi baptismum et educationem universae prolis utriusque sexus, tam forte natae quam forsitan nasci-

¹⁰⁰ Cf. Benedictus XIV, instr. (per organum S. C. de Prop. F.), 15 Feb. 1756,—Giovine, *De Dispens. Matr.*, Tom. I, § CCCXXVI, n. 2; S. C. de Prop. F., instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760,—Coll., n. 435; S. C. S. Off., 12 Jan. 1769,—*Fontes*, n. 822; litt. 23 Aug. 1877,—*Fontes*, n. 1052; Chelodi, *Ius Matr.*, n. 63, b; Wernz-Vidal, *Ius Canonicum*, V, n. 181; De Smet, *De Spons. et Matr.*, n. 515; Farrugia, *De Matr.*, n. 138; Petrovits, *New Church Law on Matrimony*, nn. 249-252.

¹⁰¹ Cf. S. C. S. Off., 6 Jun. 1860,—*AKKR*, VII (1862), 278-279; instr. (ad Ep. S. Alberti), 9 Dec. 1874,—*Fontes*, n. 1036; 22 Aug. 1875,—*NRT*, XV (1883), 579-580; 20 Jun. 1892,—*ASS*, XXX (1897-1898), 383-384; 12 Apr. 1899,—*Fontes*, n. 1219; 22 Aug. 1906,—*Fontes*, n. 1278; 22 Dec. 1916,—*AAS*, IX (1917), 13-14.

turæ, in catholicæ religionis sanctitate, et prudenter curandi conversionem coniugis ad fidem catholicam.

Cum autem de matrimonii validitate et prolis legitimatione in foro externo constare debeat, R. P. D. Ordinarius mandet ut in singulis vicibus documentum sanationis cum attestazione peractæ executionis diligenter custodiatur in curia locali, nec non curet, nisi pro sua prudentia aliter iudicaverit, ut in libro baptizatorum paroeciae, ubi pars catholica baptismum recepit, transcribatur notitia sanationis matrimonii, de quo actum est, cum adnotatione diei et anni.¹⁰⁸

The faculty apparently excludes the granting of a *sanatio in radice* for a clandestine union of two Catholics since their union does not labor under the impediments of Mixed Religion or Disparity of Cult. Again, this faculty would not serve to grant a *sanatio in radice* for a marriage of two reputed Catholics contracted in the form prescribed by the Church if later it should be discovered that one of the parties was *de facto* unbaptized, for the faculty supposes a clandestine attempt at marriage.¹⁰⁹ Nor can a *sanatio in radice* be applied to a marriage if the consent of one or both parties is wanting, whether this consent be absent from the beginning, or, if given in the beginning, it be afterwards withdrawn. If the consent was wanting in the beginning but given later, the *sanatio in radice* can be granted from the moment the consent was given, provided, of course it perseveres to the time of the granting of the *sanatio in radice*. It is sufficient that the consent exist at the moment the *sanatio in radice* is given.¹⁰⁹ ----

¹⁰⁸ Vermersch-Creusen, *Epitome*, II, n. 871.

¹⁰⁹ In support of this strict interpretation see S. C. S. Off., 22 Dec. 1916. —AAS, IX (1917), 13-14. The clause of the faculty,—"matrimonia attentata coram officiali civili vel ministro acatholico a suis subditis, etiam extra territorium, aut non subditis, intra limites proprii territorii", might, perhaps, be construed to mean that the clandestine mixed or disparate marriages of non-subjects should have been attempted in the diocese of the Bishop dispensing. The wording and entire arrangement of this clause, however, so closely follows that of the clauses referring to subjects and non-subjects in connection with the faculty to dispense from the impediments of Mixed Religion and Disparity of Cult (see infra No. 249) that the meaning is in all probability the same. The slight difference in the construction of the clause scarcely represents a sufficient variation to demand a change of purpose and meaning. It seems quite probable, therefore, that a Bishop possessing this faculty could grant a *sanatio in radice* in favor of non-subjects (even though the marriage had been contracted elsewhere) provided that the Catholic party is actually within the limits of his diocese at the time the *sanatio in radice* is granted. See No. 250.

¹⁰⁹ Cf. Canon 1140.

264. Careful investigation will at times lead to a moral certainty of the existence of a true matrimonial consent although given clandestinely and even with the knowledge of the consequent invalidity of the union. This will more readily be realized in cases where through religious indifference faith has become greatly weakened with the natural result that even the Catholic party will not be greatly concerned about the efficacy of the Church's law.¹⁰⁸ Knowledge or opinion regarding the nullity of a marriage does not necessarily exclude matrimonial consent.¹⁰⁹ As for the non-Catholic party, it will often be found that he will regard with indifference and even with contempt and manifest antagonism any effort on the part of the Catholic spouse or a priest to cast a shadow of doubt upon the validity of his marriage.¹⁰⁷

265. Antecedent to the attempt at marriage, the Church will give no dispensation to a Catholic to marry a non-Catholic until both parties give the *cautiones*. This is the Church's method of safeguarding the divine law.¹⁰⁸ Additional elements do, however, demand consideration in such cases where a marriage has already been contracted and the parties continue to live together, and for various grave reasons cannot be induced to separate. As long as the Catholic party continues to live in that state, he cannot return to the sacraments, yet sincere repentance

¹⁰⁸ Cf. Vermeersch, *De Form. Facult. S. C. de Prop. F.*, n. 94; Wernz, *Ius Decret.*, IV, n. 658, note 30.

¹⁰⁹ Canon 1085.

¹⁰⁷ It does not seem at all improbable that many marriages in which the non-Catholic party manifests such an attitude, will come under the heading of a "putative marriage". Canon 1015, § 4 does not require that both parties be Catholics, but merely gives this descriptive definition: "*si in bona fide ab una saltem parte celebratum fuerit, donec utraque pars de eiusdem nullitate certa evadat.*" The existence of the good faith of the non-Catholic party is not to be assumed in every case, but where there is moral certainty of its existence, there seems to be no cogent reason why individual cases of invalid mixed and disparate marriages may not be regarded as "putative marriages". Those children born of a putative mixed or disparate marriage would be legitimate. Cf. canon 1114. It does not appear to be necessary for the putative quality of a marriage that it be contracted *in facie Ecclesiae* as it was required in the law before the Code. Cf. Wernz, *Ius Decret.*, IV, n. 682. Chelodi (*Ius Matr.*, n. 150) favors this opinion, though Cappello (*De Sacram.*, III, n. 746) does not accept it.

¹⁰⁸ Even subsequent to the attempt at marriage, the Church will not give a simple dispensation from either impediment if the *cautiones* are refused. Cf. S. C. S. Off., 12 Apr. 1899,—*Fontes*, n. 1219.

is not always incompatible with the reluctance to separate from the invalid marriage when grave evils are foreseen to follow this procedure. Weak as may have been the Catholic's faith in spurning the authority of the Church, it is possible for him sincerely to desire a reconciliation. Yet he finds his way blocked by a marriage invalid by the law of the Church. Can, and will the Church remove the obstacle to make his reconciliation possible?

266. The Church is here faced with two evils. If she refuses to dispense from her own law, there is an imminent danger of the loss of the soul of the Catholic party now desiring reconciliation. If she dispenses with the knowledge of the non-Catholic's refusal of the *cautiones*, she dispenses with the normal safeguard against the perversion of the faith of that family. Upon the Catholic party's manifest signs of repentance, the Church seems to turn her attention largely to the good to be accomplished, and apparently choosing the lesser of two evils,¹⁰⁰ she removes the invalidity of the marriage which stands as an obstacle. The imminent danger of the loss of the Catholic's soul is of graver concern than the maintenance of the normal safeguard against his perversion. The sincerity of his repentance may be accepted as an assurance of the remote danger of his perversion. As a kind of substitute for the non-Catholic's giving of the *cautiones* the full obligation is placed upon the Catholic party to do his utmost to procure the Catholic Baptism and education of the children that have been born or will be born. Grave obstacles may at times stand in the way of completely fulfilling this obligation, yet the Catholic party is saved from sin in this regard by the acceptance of the obligation and the honest attempt to fulfill it. Even if the Catholic education of the children would be quite defective, due to the interference of the non-Catholic party, there is reasonable assurance that they will receive some instruction. Moreover, after the age of reason,

¹⁰⁰ "Ecclesia igitur ex sua parte non raro rationem habere potest et habet relaxandae legis suae, etiam quando lex divina-naturalis vel non, vel non plene cessaverit, permittens quaedam mala, ut maiora praecaveantur."—Lehmkuhl, *Casus Consc.*, II, n. 910. Cf. Albitius, *De Inconstantia in Fide*, Cap. XVIII, n. 45; De Lugo, *Tract. de Virt. Fidei Div.*, Disp. XXII, n. 22; Pontius, *De Sacram. Matr.*, Append., cap. VI, n. 5; Leurenus, *Jus Can. Univ.*, Lib. IV, quaest. 117.

and especially in later years, they become personally responsible for their own salvation, and, *caeteris paribus*, the Church places no obstacle to their reception of the sacraments. Such a procedure does not place any premium on the sin of the Catholic attempting the marriage for the entire supposition is that the Catholic *hic et nunc* is truly repentant. The danger of the violation of the divine law is removed to as remote a degree as possible. Whatever danger may remain may be tolerated for the sake of the immediate good of the sinner's conversion. In all other instances, not comprehended by the faculty to grant a *sanatio in radice*, the *cautiones* must be given by both parties. The Holy Office has repeatedly insisted that no dispensations can be given without the *cautiones*.¹¹⁰ The Church has recourse to the *sanatio in radice* only as a last and final resort to save the soul of the Catholic party. The very recourse to this extraordinary dispensation exemplifies the Church's unwillingness to dispense without the *cautiones*.

267. The question as to when, and in what circumstances, the *sanatio in radice* is to be applied is left largely to the prudence and good judgment of the Bishop possessing the faculty, provided, of course, that he observes the required conditions of the faculty itself. No definite and absolute rule can be given.¹¹¹

ART. VII. *De Individuitate Contractus*

268. In an instruction of the Holy Office sent to the Archbishop of Quebec on September 16, 1824, the principle was enunciated that the Church in dispensing from the impediment of Disparity of Cult, in order that a Catholic might marry an infidel, was to be understood at the same time (and by this one dispensation) as dispensing likewise from those impediments from which the infidel was exempt, and this on the ground that the exemption of the infidel was communicated to the Catholic "*propter individuitatem contractus*".¹¹² A further

¹¹⁰ See No. 314, notes 32-33.

¹¹¹ The extremities to which the Church is at times willing to go in applying the *sanatio in radice* for such marriages is well exemplified in the following decisions: S. C. S. Off., 22 Aug. 1875,—*NRT*, XV (1883), 579-580; 20 Jun. 1892, ad I,—*ASS*, XXX (1897-1898), 383-384.

¹¹² "Si praevia Apostolica dispensatione Paulus Balbinam duxit, etiamsi praecessisset Demetrii copula cum eadem Albina, iam pro valido habendum est matrimonium; quippe impedimentum affinitatis, praesertim ex copula illicita,

decision of the Holy Office of April 23, 1913, stated that this principle was effective also when a dispensation from the impediment of Disparity of Cult was given by delegated authority, —even when given by the delegate dispensing who had not the faculty to dispense from the impediment by which the Catholic party was bound.¹²³

269. Does this principle retain its force after the Code? The authors who favor its retention¹²⁴ contend that on the basis of canon 20¹²⁵ the Roman "*Stylus Curiae*" is to be followed since there is no expressed prescription of the Code that covers the case.¹²⁶ On the other hand the authors who deny the

ut in casu, cum non habeatur ut iuris divini, aut naturalis, sed tantum ecclesiastici, infideles ex mente Ecclesiae non afficit, quia Ecclesiae non subditos: et Ecclesia dispensando cum parte catholica super disparitate cultus ut cum infideli contrahat, dispensare intelligitur ab iis etiam impedimentis a quibus exempta est pars infidelis, ut inde huius exemptio, propter contractus individuitatem, communicata remaneat et alteri."—*Fontes*, n. 866 (ad 2).

¹²³ "1. Utrum illa dispensatio impedimentorum ecclesiasticorum locum habeat non solum quando dispensatio a disparitate cultus impertitur a S. Sede, sed etiam quando datur a delegato. 2. Utrum dicta dispensatio locum habeat, quando dato a missionario, qui habet facultatem "cumulandi", vel non habet facultatem dispensandi ab impedimento, quo ligatur pars catholica e. g. secundus gradus collateralis. R. Ad utrumque affirmative."—*LQS*, LXIX (1916), 151-152.

¹²⁴ Cappello, *Da Sacram.*, III, n. 422; Wernz-Vidal, *Ius Canonicum*, V, n. 274; Vermeersch-Creusen, *Epitome*, II, n. 346; Chelodi, *Ius Matr.*, n. 81; Ayrinhac, *Marriage Legislation*, p. 155; Blat. *Comment.*, Vol. III, P. I, n. 468.

¹²⁵ "Si certa de re desit expressum praescriptum legis sive generalis sive particularis, norma summenda est, nisi agatur de poenis applicandis, a generalibus iuris principiis cum aequitate canonica servatis; a stylo et praxi Curiae Romanae; a communi constantique sententia doctorum."—Canon 20.

¹²⁶ Cappello (*loc. cit.*) seems to stand alone in his opinion that the principle covered also those impediments binding only the Catholic party. While it is true, as he says, that all impediments of the ecclesiastical law bind only the Catholic party in a disparate marriage, his argument limps somewhat by the fact that he uses the example of the impediment of affinity, which is an impediment implying a relation. He does not mention impediments such as age or solemn vows which imply no relation but bind one party alone. Notwithstanding the inapt example it is not so evident that the conclusion is wrong. It was recognized in the Old Law, and for precisely the same reason ("propter individuitatem contractus"), that those exempt from the Tridentine law regarding the form of marriage, communicated this exemption to those who were bound, when contracting marriage with them. (See No. 96, note 34). While clandestinity is not to be regarded as an impediment, the law which bound to the form is directly analogous in its comprehension to the impediments of age or solemn vows. Cappello's conclusion does not, therefore, deserve the summary dismissal that it apparently receives from some authors. Cf. De Smet, *De Spons. et Matr.*, p. 519, not. 4.

retention of this principle after the Code¹¹⁷ lay stress on the point that since there is no mention in the Code of such an implication adhering to a dispensation from the impediment of Disparity of Cult, it must be regarded as abrogated. Canons 1051 and 1053 treat of extended implications of certain dispensations, a fact, which they say, indicates a taxative enumeration. Canon 1036, § 3, rules that though an impediment binds only one party, it nevertheless renders the marriage either illicit or invalid. Finally, though baptized non-Catholics (who have never been baptized in or converted to the Catholic Church) and the unbaptized are exempt from the Catholic form of marriage when marrying among themselves, they no longer communicate this exemption to Catholics even though they contract with them after the impediment has been dispensed from.¹¹⁸

270. The apparent weakness of all the arguments, whether they be urged for or against the retention of the principle of the communication of exemption enunciated in the two decisions of the Holy Office,¹¹⁹ leaves the question largely *in statu quo*. The force of an appeal to canon 20 is somewhat dubious when canon 6, n. 6, is considered.¹²⁰ By virtue of canon 6, n. 6, the principle seems to be abrogated. But how reconcile this with canon 20? Does canon 20 take cognizance also of the Old Law or is it restricted to the law of the Code? Is only that *Stylus Curiae* to be regarded which exists after the Code, or may not the *Stylus Curiae* of the past be invoked? The position of canon 20 in the Code and the avowed purpose of canon 6 may indicate that canon 20 is to refer only to the law of the Code, but this is far from certain.¹²¹ Canons 1051 and 1053 may or may

¹¹⁷ De Smet, *op. cit.*, n. 591; Genicot-Salsmans, *Casus Consc.*, n. 1080; Leitner, *Lehrb. des kath. Eherechts*, p. 187; Petrovits, *New Church Law on Matrimony*, n. 256. Woywod (*A Practical Commentary*, I, n. 1057) is in doubt as to whether such force can be attributed to the *Stylus Curiae* as the authors favoring the retention of the principle suppose.

¹¹⁸ Canon 1099, § 1, n. 1.

¹¹⁹ See No. 268, notes 112-113.

¹²⁰ "Si qua ex ceteris disciplinariis legibus, quae usque adhuc vigerunt, nec explicite nec implicite in Codice contineatur, ea vim omnem amisisse dicenda est, nisi in probatis liturgicis libris reperiatur, aut lex sit iuris divini sive positivi sive naturalis."—Canon 6, n. 6.

¹²¹ "Whenever there is a gap in the legislation, be it general or particular, the canonist may appeal to laws enacted in similar circumstances. In such a case the old law may serve as a norm for supplying the deficient legislation.

not represent a taxative enumeration of effects beyond the explicit comprehension of dispensations. That is precisely the question. Canon 1036, § 3, states a principle in acceptance also at the time the decisions of the Holy Office were given. It is centuries old. Upon the very foundation of this principle a dispensation was and is required from the impediment of Disparity of Cult.¹²² The appeal to canon 1099, § 1, n. 2, is of little avail for it is but a substantial repetition of Article XI, § 2, of the decree "*Ne Temere*". The decision of the Holy Office of April 23, 1913, was given after the decree "*Ne Temere*".¹²³

271. *In practice*, it seems advisable for those who dispense by a delegated faculty to proceed as though the communication of exemption were no longer recognized.¹²⁴ Those enjoying a cumulative faculty to dispense from several impediments existing in one case¹²⁵ should, it appears, dispense from all the existing impediments, provided, of course, they have the faculty to dispense from each individual impediment. Those who have not this faculty should submit such cases to the Holy Office.¹²⁶ *Post factum* a marriage contracted with a dispensation from the impediment of Disparity of Cult, yet laboring under a diriment ecclesiastical impediment from which no dispensation was given, and from which the unbaptized party is exempt, may not be declared invalid without recourse to the Holy Office.

272. The sacrament of Baptism renders its recipient subject to the laws of the Church, and it is by reason of the subjec-

[The reference is to canon 20]. With this one exception the legislator passes a final sentence on antecedent laws which have been abrogated."—Neuberger, *Canon 6*, p. 63.

¹²² See No. 237, note 33.

¹²³ If the communication of exemption still exists in the case of marriages with the unbaptized, it seems likewise to affect the post-Code marriages of the unbaptized with those whose Baptism has not been received in the Catholic Church or who have never been converted to the Catholic Church. Their liberation from the impediment of Disparity of Cult may be regarded as a kind of *quasi* dispensation in a very general sense, and should another diriment impediment of ecclesiastical law, to which the baptized non-Catholic party is bound, exist for a marriage with an unbaptized person, the exemption of the unbaptized party is in all probability communicated to the baptized party.

¹²⁴ The opinion favoring its retention seems, however, to be probable.

¹²⁵ Since the American Bishops dispense by virtue of a general indult, they possess the cumulative faculty. Cf. canon 1049, § 2.

¹²⁶ Cf. canons 1050; 247, § 3.

tion of one of the parties that the Church has exclusive jurisdiction over disparate marriages. The Church alone is competent to dispense from the impediment of Disparity of Cult and those impediments that imply a relation such as consanguinity and affinity,— regardless of their concomitant existence by virtue of the civil law for the unbaptized party.¹²⁷ While, indeed, the Church does not claim a direct jurisdiction over the unbaptized, the exemption cedes to an indirect jurisdiction over the unbaptized in reference to any marriage they may contract with the baptized.¹²⁸ It appears, therefore, that even if the unbaptized party were bound by an impediment of the civil law such as age, the *habilitas* given the baptized party by the Church would be communicated to the unbaptized party. Vlaming,¹²⁹ on the other hand, urges that in such cases the unbaptized remain *inhabiles* through the civil law, and that the Church could not render them *habiles*.

273. Vlaming's opinion supposes that the jurisdiction of the State over the marriages of the unbaptized extends likewise indirectly over marriages between the baptized and the unbaptized. The assumption seems to be somewhat gratuitous. Whether the State has jurisdiction over marriages *between the unbaptized* in its own right or *per accidens*, i. e., by virtue of necessity, is not a vital issue in the present discussion. It does seem apparent, however, that the State possesses such jurisdiction by neither title in disparate marriages, which are clearly under the jurisdiction of the Church.¹³⁰ The Roman civil law had its impediment to the marriages of Christians with Jews,¹³¹ yet Pope Benedict XIV clearly draws attention to the fact that (in either capacity, whether it affected the Jew or the Christian) it in no way bound the Church.¹³²

274. When Pope Leo XIII writes that marriage by reason

¹²⁷ Cf. Benedictus XIV, ep. *Singulari*, 9 Feb. 1749, § 7,—*Fontes*, n. 394.

¹²⁸ The restricted form of the impediment of Disparity of Cult as it is established in canon 1070, § 1, is not under consideration here.

¹²⁹ *Prael. Iuris Matr.*, n. 195. Vide etiam De Becker, *De Spons. et Matr.*, p. 44.

¹³⁰ Cf. canons 247, § 3; 1099, § 1, n. 2; 1964. "... exclusiva potestas iudicialis supponit exclusivam potestatem legiferam; nam ius fori sequitur ius condendi leges."—Wernz-Vidal, *Ius Canonicum*, V. n. 52.

¹³¹ See No. 56, notes 26-27.

¹³² Ep. *Singulari*, 9 Feb. 1749, § 7,—*Fontes*, n. 394.

of its divine origin is "*sua vi, sua natura, sua sponte*", sacred, belonging *exclusively* to the authority of the Church,¹²⁶ a difficulty arises even as to the absolute acceptance of the opinion giving the State jurisdiction over marriages between the unbaptized. There can scarcely, therefore, be question of an indirect jurisdiction of the State over disparate marriages. It would be impossible, according to De Smet,¹²⁶ to have one and the same marriage (which is a "*contractus individuus*") regulated independently by two distinct jurisdictions. De Smet,¹²⁶ Wernz,¹²⁷ Gasparri,¹²⁷ Chelodi,¹²⁸ Wernz-Vidal,¹²⁸ and Cappello¹²⁹ are, therefore, of the opinion that the unbaptized are not bound by the impediments of the civil law when contracting with the baptized who are rendered *habiles* by the Church.

275. As a practical measure, however, pastors should not, as a general rule, assist at the marriages of those impeded by the civil law. The civil law in the United States does not provide for dispensations from civil impediments. While in theory the State has no right to impede marriages under the jurisdiction of the Church, yet the practical consequences of disregarding the civil law must be kept in mind. Those who would contract marriage in spite of the civil law render themselves liable to civil prosecution, which would bring dire consequences upon themselves and their children. In many States also, the official witness of the marriage (such as the pastor) would be subject to prosecution. It is contrary to the mind and wish of the Church for pastors to assist at marriages which render them and the parties subject to severe civil penalties.

¹²⁶ "Etenim cum matrimonium habeat Deum auctorem, fueritque vel a principio quaedam Incarnationis Verbi Dei adumbratio, idcirco inest in eo sacrum et religiosum quiddam, non adventitium, sed ingenitum, non ab hominibus acceptum, sed natura inisum . . . Igitur cum matrimonium sit sua vi, sua natura, sua sponte sacrum, consentaneum est, ut regatur ac temperetur non principum imperio, sed divina auctoritate Ecclesiae, quae rerum sacrarum *sola* habet magisterium."—ep. encyl. *Arcanum*, 10 Feb. 1880, n. 11,—*Fontes*, n. 580.

^{126a} *De Spons. et Matr.*, n. 438.

^{126b} *Loc. cit.*

^{126c} *Ius Decret.*, n. 60, Scholion.

¹²⁷ *De Matr.*, n. 306. Here he recedes from the opposite position he had defended in the second edition (Parisii, 1900), n. 297.

¹²⁸ *Ius Matr.*, n. 12.

^{128a} *Ius Canonicum*, V, n. 52.

¹²⁹ *De Sacram.*, III, n. 67.

ART. VIII. IMPLICATIONS OF DISPENSATION

276. The Church in dispensing either from the impediment of Mixed Religion or Disparity of Cult,¹⁴¹ dispenses only from her own law, i. e., she removes those obstacles impeding or invalidating a marriage which have been erected through ecclesiastical legislation. The dispensation does imply, however, that, in the judgment of the Church, the divine and natural law are not in a proximate danger of violation. It is not permissible for anyone to condemn indiscriminately those mixed and disparate marriages contracted in conformity with all the conditions prescribed by the Church.¹⁴²

277. A separation from bed and board may be permitted the Catholic party by the Ordinary if, after a mixed or disparate marriage contracted with a dispensation (*et coram Ecclesia*), the non-Catholic party violates the obligations assumed in the *cautiones*.¹⁴³ This separation is to take place only on the authority of the Ordinary, unless the danger of perversion is so imminent that delay would be perilous, in which case the Catholic party has the right to separate on his own authority.¹⁴⁴ There can, however, be no dissolution of the bond itself on the ground of a contumely of the Creator.¹⁴⁵ A disparate marriage contracted *coram Ecclesia* with a dispensation from the impediment of Disparity of Cult, cannot be dissolved *in favorem fidei*.¹⁴⁶

¹⁴¹ A dispensation from the impediment of Mixed Religion does not imply an implicit dispensation from the impediment of Disparity of Cult. See No. 208; No. 251, note 85.

¹⁴² "Quum autem matrimonium mixtum debitis cautionibus superius indicatis et dispensatione obtenta contrahitur, illud tamquam legitimum, ut patet, haberi debet, utpote inter personas initum, quas Ecclesia agnovit in illis adiunctis habiles ad valide et licite matrimonium contrahendum. Nemo igitur hoc matrimonium damnare multoque minus sacrilegii notam illi inuere audeat."—Conc. Plen. Balt. III (1884), n. 132. But see Lehmkuhl, *Casus Consc.*, II, n. 910; No. 36, note 25; No. 115, note 4.

¹⁴³ An example of a declaration of nullity given on the ground of the non-observance of the *cautiones* whose fulfillment had been placed as a *sine qua non* condition of the Catholic party's matrimonial consent, may be found in S. R. Rota, 11 Aug. 1921,—AAS, XIV (1922), 512-523. Cf. *Apolinaris*, I (1928), 120-121.

¹⁴⁴ Cf. canon 1131; S. C. S. Off. (Cochinchin.), 1 Aug. 1759, ad. 4,—*Fontes*, n. 810.

¹⁴⁵ Conc. Trident., sess. XXIV, *de Sacram. Matr.*, can. 5.—Denz., n. 975.

¹⁴⁶ Cf. canon 1120, § 2; S. C. S. Off., 14 Jun. 1708,—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 704; (Cochinchin.), 1 Aug. 1759, ad. 4,—*Fontes*, n. 810; (Nankin.), 5 Mart. 1852,—*Fontes*, n. 918; instr. (ad Ep. S. Alberti), 9 Dec. 1874, ad dub. 2.—*Fontes*, n. 1036; (ad Vic. Ap. Iaponiae Merid.), 4 Feb. 1891,—*Fontes*, n. 1130.

CHAPTER XII

CAUSES FOR DISPENSATION

ART. I. MODIFICATION OF EARLIER DISCIPLINE

278. The severe discipline of the Middle Ages regarding the association of Catholics with aliens to the Faith did not contemplate the possibility of dispensation for mixed and disparate marriages,—in fact the question was not even discussed by mediaeval canonists and theologians. When Pope Clement VIII, in 1604, granted the first recorded dispensation for a mixed marriage he explicitly called attention to the novelty and difficulty of the entire procedure.¹ The Church was apparently willing to grant certain exceptions for disparate marriages in the new fields of missionary activity, yet from the very beginning of the religious revolt of the sixteenth century the Church seemed to appear almost at a loss as to how dispensations for *mixed marriages* could be justified in the very places where the Catholic Faith had flourished for centuries. While she might tolerate for a time the contracting of mixed marriages among the common people without her express permission,² she was altogether reluctant to grant dispensations which might in any way be construed as a positive approval of such unions.³ She would make only one exception, namely, for reasons of a manifest public concern to the Church or to the State, in other words for the *causa publica*.⁴ For at least a century and a half the Church's dispensations for mixed marriages were confined to those of the Catholic nobility.⁵ Yet, when mixed marriages contracted among the common people without the Church's permission continued to grow in number; when the Church could no longer tolerate such an abuse and sought to enforce

¹ See No. 86, note 23.

² See No. 97, note 37; No. 104, notes 53-54.

³ See No. 97, note 37.

⁴ See No. 95, notes 31-32.

⁵ See No. 95, note 30.

strictly the necessity of dispensation for the mixed marriages of the common people,—it was then that the requirement of the *causa publica* was necessarily modified.* The *causa gravis* came, therefore, to receive recognition and accordingly among modern authors, who commit themselves on the question of the necessary quality of the causes, it is acknowledged that the Church will admit also grave causes that regard the *bonum privatum*.

ART. II. NECESSITY OF JUST AND GRAVE CAUSES

279. The severity with which the Church has always forbidden mixed and disparate marriages would be but an idle gesture if, on the other hand, she freely and indiscriminately permitted such unions. The very reasons for the impediments,—the prohibition of a "*communicatio in sacris*" with non-Catholics, the profanation of a sacrament, the deformity of such marriages, proceeding either from a modal or radical difference existing between the parties, demand truly grave causes to justify a dispensation from the Church's law.[†] Moreover, though a dispensation is tantamount to a declaration that the divine and natural law is in no proximate danger of violation, there remains in most instances at least a remote danger to the faith of the Catholic spouse and the children. The Church will not permit her members to run risks that are more or less inherent to all such marriages unless there be just and grave causes for so doing.[‡] If all the impediments demand just and grave

* In a certain sense a notable private good, i. e., one affecting only one person or a very small number (such as the contracting parties themselves) will redound to the public good (cf. Perez, *De Matr.*, Disp. XLV, Sect. V, n. 3), but this was not the sense in which the *bonum publicum* was demanded as a cause for dispensation from the impediment of Mixed Religion. It was rather in the sense of a public good for the Church or for the State.

† See No. 105 with note 55.

‡ Cf. Cappello, *De Sacram.*, III, n. 314; Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 712; De Smet, *De Spons. et Matr.*, n. 506; Bonacina, *Op. Omnia*, Tom. I, Disp. IX, Quaest. III, Punct. VII, n. 2.

§ "... ad matrimonium mixtum permittendum minime sufficit ut sponsi cautiones . . . admittere parati sint, nec non ceteras clausulas in rescriptis Apostolicae Sedis adhiberi solitas, sed omnino iustae gravesque requiruntur causae, ut facultas dispensandi super mixtae communionis impedimento licite executioni mandetur. Cautiones enim illae ideo naturali divinoque iure exiguntur atque exigi debent, ut pericula intrinseca quae mixtis insunt matrimoniis removeantur; at vero ut gravibus fidei ac morum periculis etiam sub opportunitis

causes for dispensation,¹⁰ how much more so those which derive a part of their prohibitive force from the very natural and divine law. It is of no little significance that the Code in its legislation on the matrimonial impediments *specifically* mentions the necessity of just and grave causes only for the impediments of Mixed Religion and Disparity of Cult.

CANON 1061

§ 1. *Ecclesia super impedimento mixtae religionis non dispensat, nisi:*

1° *Urgeant iustae ac graves causae.*¹¹

§ I. DISPENSATIONS GRANTED WITHOUT JUST AND GRAVE CAUSES

280. The authors are unanimous in their agreement that if the Pope were to dispense from the impediments, especially those of Mixed Religion and Disparity of Cult, without a just and grave reason, the dispensation would be gravely illicit. Others carry their conclusions even further with regard to the two impediments in question, insisting that under such circumstances the dispensation would be invalid. The Pope, they argue, is responsible to God for the proper administration of the divine law and he cannot, therefore, act validly in dispensing without a just cause.¹²

281. It is to be freely admitted that those who have received a delegated faculty to dispense would act invalidly if they dispensed without a just and grave cause.¹³ In all likeli-

cautionibus fideles se exponere permittantur, grave aliquod incommodum ceteroquin haud devitandum imminere necesse est."—S. C. de Prop. F., litt. encycl., 11 Mart. 1868,—*Coll.*, n. 1324. Cf. Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 198.

¹⁰ Cf. canon 84, § 1; Benedictus XIV, const. *Ad Apostolicæ*, 25 Feb. 1742, §§ 1, 4, 6,—*Fontes*, n. 325; S. C. de Prop. F., instr., 9 Maii 1877,—*Coll.*, n. 1470.

¹¹ Canon 1071 establishes the same norms for the impediment of Disparity of Cult.

¹² Cf. De Justis, *De Dispens. Matr.*, Lib. III, cap. I, nn. 18-23; Giovine, *De Dispens. Matr.*, Tom. I, § LXIV, nn. 2-4.

¹³ Canon 84, § 1. Cf. S. C. de Prop. F., litt. encycl., 11 Mart. 1868,—*Coll.*, n. 1324; Giovine, *op. cit.*, Tom. I, § LXVI, n. 4; Cappello, *De Sacram.*, III, n. 314; Cerato, *Matr.*, n. 55; Wernz-Vidal, *Ius Canonicum*, V, n. 178; De Smet, *De Spons. et Matr.*, n. 506.

hood, a dispensation is also invalid (at least in the external forum) if it is granted without a just and grave cause being known to the one dispensing by a delegated faculty,—even though a just and grave cause did exist objectively.” It does not appear, however, that invalidity may be predicated of dispensations granted by the Pope without cause from the impediments of Mixed Religion and Disparity of Cult. With reference to these impediments, the Church does not pretend to dispense from the divine or natural law, but rather exercises this power only over her own law. In such contemplated marriages where the divine prohibition may be judged to cease, but which from the point of view of the Church would not possess justifying reasons for dispensation, it is by no means manifest that a dispensation granted by the Pope without a cause would be invalid.” Even on the supposition that the divine law were in danger of being violated, such dispensations, though gravely illicit, appear to be valid. The dispensation is from the law of the Church, not from the divine law.” At best, the discussion has merely an academic interest for *de facto* the Pope will not dispense from these impediments unless just and grave causes do exist, and where the divine law is not in proximate danger of violation.”

ART. III. WHAT ARE JUST AND GRAVE CAUSES?

282. What, then, are just and grave causes for dispensing from the impediments of Mixed Religion and Disparity of Cult? While the Code specifically demands just and grave causes for dispensation, it does not indicate what causes are to be

¹⁴ Cf. S. C. de Prop. F., 2 Aug. 1901.—ASS, XXXIV (1901-1902), 640; De Justia, *op. cit.*, Lib. III, cap. I, n. 28. Konings-Putzer (*Comment. in Facult.*, p. 80-81) is of the opinion that a dispensation would be valid if a sufficient cause existed objectively, even though unknown to the one dispensing. Maroto (*Institutiones*, n. 306, B) inclines to the same opinion though he admits the probability of the opposite opinion that the dispensation would be invalid.

¹⁵ Cf. Augustine, *Rights and Duties of Ordinaries*, p. 121.

¹⁶ Cf. Petrovits, *New Church Law on Matrimony*, n. 244. See *infra* No. 334.

¹⁷ “Inutilis videtur esse ulterior inquisitio, num in ista hypothese saltem valida sit dispensatio R. Pontificis super lege ecclesiastica, qua idem impedimentum nititur. Nam R. Pontifex manente prohibitione divina nunquam dispensant ab hoc impedimento canonico.”—Wernz, *Ius Decret.*, IV, n. 583, not. 24.

regarded as just and grave. To aid in the solution of this question recourse will be had to those lists of causes recognized as canonical by the Holy See, and to those causes having a more particular reference to the impediments in question and generally accepted by approved authors.

283. There are two lists of causes that are recognized by the Holy See, though in most respects they are largely identical. One is a list of sixteen causes¹⁸ contained in an instruction of the Sacred Congregation of the Propaganda;¹⁹ the other is a list of twenty-eight causes²⁰ drawn up by Cardinal Masella as rep-

¹⁸ 1. Angustia loci; 2. Aetas foeminae superadulta; 3. Deficientia aut incompetencia dotis; 4. Lites super successione bonorum iam exortae, vel earumdem grave aut imminens periculum; 5. Paupertas viduae; 6. Bonum pacis; 7. Nimia, suspecta, periculosa familiaritas, nec non cohabitatio sub eodem tecto, quae facile impediri non possit; 8. Copula cum consanguinea vel affini vel alia persona impedimento laborante praehabita, et praegnantia, ideoque legitimitas prolis; 9. Infamia mulieris, ex suspitione orta, quod illa suo consanguineo aut affini nimis familiaris, cognita sit ab eodem, licet suspicio sit falsa; 10. Revalidatio matrimonii; 11. Periculum matrimonii mixti, vel coram acatholico ministro celebrandi; 12. Periculum incestuosi concubinatus; 13. Periculum matrimonii civilis. Ex dictis consequitur, probabile periculum quod illi, qui dispensationem petunt, ea non obtenta, matrimonium dumtaxat civile, ut aiunt, celebraturi sint, esse legitimam dispensandi causam; 14. Remotio gravium scandalorum; 15. Cessatio publici concubinatus; 16. Excellentia meritorum, cum aliquis aut contra fidei catholicae hostes dimicatione aut liberalitate erga Ecclesiam, aut doctrina, virtute, aliove modo de Religione sit optime meritus.

¹⁹ 8 Maii 1877.—*Coll.*, n. 1470.

²⁰ 1. Propter angustiam loci; 2. Propter angustiam locorum; 3. Propter angustiam, cum clausula, et si extra, dos non esset competens; 4. Propter incompetenciam dotis Oratricis; 5. Propter dotem cum augmento; 6. Pro indotata; 7. Quando alius augeat dotem; 8. Propter inimicitias; 9. Pro confirmatione pacis; et propter foedera inter Principes et Regna; 10. Propter lites super successione bonorum; 11. Propter dotem litibus involutam; 12. Propter lites super rebus magni momenti; 13. Pro Oratrice filiis gravata; vel parentibus orbata; 14. Pro Oratrice excedente 24 annum aetatis; 15. Propter difficultatem virorum accedendi ad locum, contrahendum cum loci habitatoribus, e. g., quia expositi pyratum invasionibus. Propter virorum paucum numerum, e. g., ratione belli; 16. Propter catholicam religionem contrahentis in tuto ponendam; et periculum matrimonii mixti; 17. Propter spem conversionis compartis ad catholicam religionem; 18. Ut Bona conserventur in familia; 19. Pro illustris familiae conservatione. Pro conservatione regiae stirpis; 20. Ob excellentiam meritorum; 21. Ob familiarum honestatem conservandam.—Quod ipsi, qui ex honestis familiis sunt, ad eandem conservandam familiarum honestatem; 22. Ob infamiam; et Scandalum; 23. Ob copulam. Ob raptum; 24. Ob matrimonium civile; 25. Ob matrimonium coram ministro protestante; 26. Ob matrimonium nulliter contractum; 27. *Ex certis rationabilibus causis.*—Scilicet, ob copiosiorum Compositionem in gradibus aliquantulum remotis; vel in gradibus remotioribus ob causam boni publici Pontificis animum moventem; 28. *Ex certis specialibus rationabilibus causis, Oratorum animos moventibus et Sanctitati Vestrae expositis.*—Scilicet ob copulam, vel actus inhonestos, quos ob honorem Oratorum, attenta eorum qualitate, non expedit explicare.

representative of those recognized by the Holy See.²¹ The list of causes given by the Sacred Congregation of the Propaganda is preceded by an admonition that is to be examined carefully. It begins by reminding those who have delegated faculties of dispensing, that dispensations are not to be granted "*nisi legitima et gravis causa interveniat*", and that the graver the impediment, the graver should be the cause for dispensing.²² Certain abuses had arisen that prompted the necessity of an instruction:

Idcirco opportunum visum est in praesenti Instructione paucis perstringere praecipuas illas causas, quae ad matrimoniales dispensationes obtinendas iuxta canonicas sanctiones et prudens ecclesiasticae provisionis arbitrium, pro sufficientibus haberi consueverunt . . .

Atque ut a causis dispensationum exordium ducatur, operae pretium imprimis animadvertere, unam aliquando causam seorsim acceptam insufficientem esse, sed alteri adiunctam sufficientem existimari . . . Huiusmodi autem causae sunt quae sequuntur.

§ I. THE GRAVER THE IMPEDIMENT, THE GRAVER THE CAUSE REQUIRED FOR DISPENSATION

284. With reference to the admonition that the graver the impediment, the graver should be the cause for dispensation, it is well to note that the special insistence of canon 1061, § 1, n. 1, that just and grave causes must exist before the Church will dispense, indicates clearly that the two impediments of Mixed Religion and Disparity of Cult are to be regarded as grave impediments.²³ And between these two impediments themselves there appears to be a difference of gravity that renders Disparity of Cult, because of its constituent elements and diriment nature, an impediment of greater concern than that of Mixed Religion.

²¹ Ex S. Dataria Apostolica,—ASS, XXXIV (1901-1902), 34-35.

²² "Cum dispensatio sit iuris communis relaxatio cum causae cognitione, ab eo facta, qui habet potestatem, exploratum omnibus est dispensationes ab impedimentis matrimonialibus non esse indulgendas, nisi legitima et gravis causa interveniat. Quin imo facile quisque intelligit, tanto graviorem causam requiri, quanto gravius est impedimentum, quod nuptiis celebrandis opponitur."—S. C. de Prop. F., instr., 8 Maii 1877,—Coll., n. 1470. Cf. canon 84, § 1.

²³ Even though Mixed Religion be but a prohibitive impediment, it must be regarded as a major impediment and can in no way be assimilated to the list of minor impediments given in canon 1042. The entire history of the Church's attitude towards the marriages of Catholics with heretics and schismatics quite destroys the probability of any opinion to the contrary. Cf. Augustine, *Rights and Duties of Ordinaries*, p. 274.

Indeed, some authors are of the opinion that a graver cause should exist for dispensing from the former than from the latter.²²⁵ The Code, however, indicates no necessity of a graver cause for dispensation from the impediment of Disparity of Cult, nor can such a distinction be traced in the history of the Church's attitude in dispensing from these two impediments,—if anything, she appears to have had the graver concern for mixed marriages. Others call attention to the fact that a graver cause should exist in Christian communities than in missionary regions,²²⁶ and that the Church is more disposed to dispense for cases of validation than for contemplated marriage.²²⁷

225. Some discussion has also turned upon the required gravity of a cause depending on whether the woman or the man be a Catholic. On the ground that the danger of perversion is more remote, Petrovits argues that the Church is more disposed to dispense in the case of a Catholic man marrying an infidel than *vice versa*.²²⁸ It is to be noted, however, that the majority of the decisions of the Holy See that may be referred to in confirmation of this opinion are those concerned with the pagan countries of the Orient where the laws and customs grant the husband a complete *potestas* over his wife.²²⁹ For this reason

²²⁵ Cf. De Smet, *De Spons. et Matr.*, n. 590. Augustine (*Commentary*, V, p. 185) says that the causes should be as grave if not graver. Petrovits (*New Church Law on Matrimony*, nn. 190, 245) cites the same causes for both impediments. There is a real doubt, on the other hand, whether, *de facto*, the Church has always regarded the impediment of Disparity of Cult with graver concern than that of Mixed Religion. By virtue of the faculty granted by Pope Leo XIII in 1888, Ordinaries could dispense from the impediment of Disparity of Cult but not from the impediment of Mixed Religion. See No. 103, note 49.

²²⁶ Chelodi, *Ius Matr.*, n. 81; Wernz-Vidal, *Ius Canonicum*, V, n. 273, not. 47.

²²⁷ Chelodi, *loc. cit.*; Wernz-Vidal, *loc. cit.* Cf. S. C. de Prop. F., instr. (ad Vic. Ap. Fokien.), 13 Sept. 1760,—*Coll.*, n. 435; litt. (ad Vic. Ap. Tunk. Orient.), 3 Maii 1828,—*Coll.*, n. 804.

²²⁸ *New Church Law on Matrimony*, n. 248.

²²⁹ "Quae duo quidem eo faciliora debent esse viris catholicis quod per leges sinenses maxima est virorum potestas super proprios uxores; itaque ea potestate uti possunt ut prolem, nullo metu, in fide catholica educeant, atque ut persuasione, exemplo ceterisque modis charitatis et prudentiae propriis, uxorem ad fidem convertant."—S. C. de Prop. F., instr. (pro Miss. Sin.), 16 Feb. 1795,—*Coll.*, n. 623. The *dubia* proposed for the following two decisions of the Holy Office are witnesses to the observance of this practice: S. C. S. Off. (Sutchuen.), 15 Feb. 1780,—*Fontes*, n. 840; (Pekin.), 29 Apr. 1891,—*Fontes*, n. 1134. Vlaming (*Prael. Iuris Matr.*, n. 240) likewise favors this opinion for his country because of the prescriptions of the civil law.

the opinion has due limitations and scarcely enjoys the status of a general principle. On the contrary Pope Pius VI seemed to be quite inclined to the opposite opinion when he warned against Catholic men marrying heretical women.²⁰ The authors such as De Lugo,²¹ Ballerini-Palmieri,²² Gasparri,²³ and Cappello²⁴ merely discuss both sides of the question²⁵ without arriving at any definite conclusions. They call attention to the apparent greater danger of perversion if the woman be a Catholic (especially if the civil law grants the husband almost a complete *potestas* over his wife), yet admit that in many instances the Catholic education of the children will be better safeguarded if the mother be a Catholic.

Since in this country the *potestas* of the husband over the religious matters of his household is scarcely recognized by the civil law, it seems that the lesser of two evils would, as a general rule, be represented by the fact that the mother in a mixed or disparate marriage be the Catholic, though the necessity of demanding a graver cause if the husband be a Catholic is by no means obvious.

286. But again, while it is to be admitted, as a general principle, that the graver the impediment, the graver should be the cause for dispensation, many difficulties will arise in putting this principle into practice. As a matter of principle, it is thoroughly logical to contend, for example, that normally a graver cause should exist to dispense from the second degree of

²⁰ In his opinion the danger of perversion would be greater if the woman were a heretic and by way of confirmation he cites Biblical instances. He quotes also from Cardinal Bellarmine: "ea siquidem est natura foeminarum, ut multo facilius sit ut ipsae viros pertrahant ad errorem, quam ut viri eas perducant ad veritatem."—rescript. ad Card. Archiep. Mechlinien., 13 Jul. 1782, n. 2,—*Fontes*, n. 471. Cf. S. C. S. Off. (Helvetiae), 21 Jan. 1863, n. 2,—*Fontes*, n. 973. Nevertheless, Pius VIII (litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482) and Gregory XVI (ep. *Non sine gravi*, 23 Maii 1846, n. 2,—*Fontes*, n. 503) center their concern on Catholic women marrying heretics. Cf. Albitius, *De Inconstantia in Fide*, Cap. XVIII, n. 45.

²¹ *Tract de Virt. Fidei Div.*, Disp. XXVII, Sect. II, n. 90. De Lugo dwells with some detail upon hypothetical cases of mixed marriages among the nobility.

²² *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 719.

²³ *De Matr.*, n. 504.

²⁴ *De Sacram.*, III, n. 314.

²⁵ Vide etiam Clemens XIII, ep. *Quantopere*, 16 Nov. 1763, §§ 2-3,—*Fontes*, n. 460.

consanguinity than from the third degree. There are, indeed, some causes, especially those of a public or a quasi public nature, that are obviously of greater import than others of a private kind, but at certain points the distinction among the causes between grave and graver is quite obscure. What is the precise difference in gravity, for example, between such causes as: the validation of an invalid union; the cessation of concubinage; the removal of grave scandals? Individual instances might emphasize a distinction but the point at issue is scarcely clarified by such a recourse. The principle seems to rest rather on the supposition that there is an objective degree of gravity among the causes irrespective of particular circumstances and that some causes will suffice for some impediments but not for others.⁸⁵ But to what degree in this scale of gravity can one point as a line of demarcation between those causes sufficient for the impediment of Mixed Religion but insufficient for the impediment of Disparity of Cult, or for any of the hypothetical situations postulated by the authors? Obviously, it will be difficult to apply the principle in practice and it may be stated at once that as long as there is a presence of a grave cause or causes, which requirement is the only one demanded by canon 1061, § 1, n. 1⁸⁶ for these impediments, the dispensation may be granted, whether the cause be graver or less grave than other grave causes.

§ II. THE SUFFICIENCY OF CAUSES TAKEN SINGLY

287. There is yet another point in the introduction to the list of causes given by the Sacred Congregation of the Propaganda that deserves careful examination. It is stated that at times a certain cause may not suffice of itself but when taken conjointly with another or others it will suffice. Immediately following this is the last sentence: "*Huiusmodi autem causae sunt quae sequuntur.*" Does this sentence refer to the preceding paragraph where the introduction states that a list of the principal canonical causes sufficient for matrimonial dispensations will be

⁸⁵ Cf. Vermeersch, *De Form. Facult. S. C. de Prop. F.*, p. 90-91.

⁸⁶ The clause in canon 1061, § 1, n. 1, "*Urgeant iustate ac graves causae*", does not necessarily imply that in every petition there must be more than one cause. The salient point seems to be that the cause or causes urged must be just and grave.

given, or does it refer rather to the paragraph of which it is the last sentence?"

Unless it is quite misplaced, the sentence refers to the paragraph of which it is a part and its meaning would, therefore, seem to be, that none of the causes listed, even though they be canonical and the principal causes recognized by the Holy See, are sufficient for dispensation when taken singly, but must be taken conjointly with at least one other, or be given this sufficiency through the circumstances of a particular case. Is there not perhaps some difficulty in reconciling this sentence with the preceding paragraph of the introduction and with a sentence immediately following the list of causes: "*Hae sunt communiores potioresque causae, quae ad matrimoniales dispensationes impetrandas adduci solent . . .*"? Are there no causes, apart from the *causae publicae*, that will suffice singly?

288. The question becomes more confused upon turning to the authors, for when they comment upon the causes sufficient for dispensation from the impediments of Mixed Religion and Disparity of Cult and admit that private causes will also be recognized, they call attention at the same time to the principle that the cause or causes must be proportionate to such grave impediments. They conclude, therefore, that such causes as *aetas superadulta*, *angustia loci*, *paupertas viduae*, *incompetentia dotis*, and *bonum pacis*, which may be urged for other impediments, will not readily suffice, when taken singly, for the impediments of Mixed Religion and Disparity of Cult.²⁸ The direct implication is that there are causes in the list given by the Congregation of the Propaganda that will suffice when taken singly. But why single out these causes that are to be regarded as insufficient when the last sentence of the introduction to the list in which they appear suggests that none of the causes in the entire list, when taken singly, have this sufficiency? And again, why do the authors number among the causes, appar-

²⁷ See No. 283.

²⁸ Cf. De Smet, *De Spons. et Matr.*, n. 506; Farrugia, *De Matr.*, n. 133; Cappello, *De Sacram.*, III, n. 314; Cerato, *Matr.*, n. 55; Vlaming, *Prael. Iuris Matr.*, n. 217; Winslow, *Vicars and Prefects Apostolic*, p. 106; Petrovits, *New Church Law on Matrimony*, nn. 190, 245; Wernz, *Ius Decret.*, IV, n. 586, not. 31; Wernz-Vidal, *Ius Canonicum*, V, n. 178, not. 30; Vermeersch, *De Form. Facult. S. C. de Prop. F.*, p. 91.

ently sufficient when taken singly, such a cause as "*periculum matrimonii civilis*" which appears in the list given by the Congregation of the Propaganda?"

289. In the attempt to offer a kind of solution of this difficulty, the opinion is ventured that, *post factum*, a dispensation granted by virtue of a delegated faculty from either of the two impediments in question, for any one of the causes enumerated in either of the two recognized lists as being canonical and legitimate," is not to be presumed or to be declared invalid without referring the matter to the Holy Office." *Ante factum*, those who dispense by a delegated faculty must follow the *Stylus Curiae* of Rome." This *stylus* may be unknown to many in its more intricate details, yet a fair guide, as a substitute, may be offered in the lists of causes given by approved authors as sufficient for these two impediments." Cognizance must be taken of the approved authors' opinions with reference to the insufficiency of certain causes taken singly. This is demanded at least for the liceity of the dispensation. Unless the cause urged for dispensation be of a public or at least a quasi public nature, more than one cause should normally be given in the petition. If there is a doubt about the sufficiency of a cause, canon 84, § 2^a may be employed to solve the doubt. Attention is also to be

³⁰ See No. 283, note 18 (cause n. 13).

³¹ See No. 283, notes 18, 20. Obviously, a cause such as "*periculum matrimonii mixti*" is not included in the comprehension of this statement.

³² The presumption is for the validity of the act of dispensing until it is clearly proved to be invalid. Knecht (*Grundriss des Eherechts*, p. 108, not. 1) maintains that any of the causes given in Cardinal Masella's list (See No. 283, not 20), whether taken singly or collectively, is sufficient for matrimonial dispensations. Speaking of the causes required for the impediment of mixed Religion, Augustine (*Commentary*, V, p. 147 [also on p. 185]) writes: "Concerning the reasons we refer to canon 1054 [where he gives the list published by the Congregation of the Propaganda]. Any of the reasons there stated will suffice for obtaining a dispensation." Joseph Palica (*Analecta Ecclesiastica*, Romae, X [1902], 361) is of the same opinion: "*Hodie vero sufficient pro dispensatione largienda etiam ceterae causae canonicae quae pro reliquis impedimentis valeant, dummodo adsint semper cautiones.*" Vide etiam Blat, *Comment.*, Vol. III, P. I, n. 456. The prescription of canon 84, § 2 likewise strengthens the presumption for the validity of the dispensation.

³³ Cf. Wernz, *Ius Decret.*, IV, n. 586; Konings-Putzer, *Comment. in Facult.*, p. 15.

³⁴ See also canon 29.

³⁵ "Dispensatio in dubio de sufficientia causae licite petitur et potest licite et valide concedi."—Canon 84, § 2.

called to the fact that such causes as *aetas superadulta*, and *an-gustia loci* must exist in the Catholic party," since the dispensation is given only to the Catholic party."

A. CAUSES REGARDED AS SUFFICIENT BY APPROVED AUTHORS

290. Lists of causes that have a particular reference to the impediments of Mixed Religion and Disparity of Cult are found especially among the more recent authors. All agree, of course, that any cause representing the welfare of a Christian State or of the Church will be quite sufficient, but in addition the authors cite other causes that apparently possess this sufficiency." Among them may be enumerated the following:

1. A grave scandal arising from diffamation, pregnancy, or from some other source, that cannot be prevented except through a mixed or disparate marriage."

2. The predominance of heretics or schismatics (or infidels)

" Wernz, *Ius Decret.*, IV, nn. 510, 586;; Wernz-Vidal, *Ius Canonicum*, V, n. 178; De Smet, *De Spons. et Matr.*, p. 443, not. 4; Chelodi, *Ius Matr.*, n. 81; Durieux, *The Busy Pastor's Book on Matrimony*, p. 81, note 104.

" S. C. S. Off., 12 Jan. 1769, n. II, 1.—*Fontes*, n. 822; (Southwark), 22 Nov. 1865,—*Fontes*, n. 989; Pius VI. rescript. ad Card. Archiep. Mechlinien., 13 Jul. 1782, n. 3,—*Fontes*, n. 471; Wernz, *op. cit.*, n. 510.

" With reference to the sufficiency of a cause, Cerato (*Matr.*, n. 55) says: "*In periculo mortis, vel in casu urgentiore, causa iusta et gravis ad validitatem dispensationis habetur in ipsis rerum adiunctis.*" It appears, however, that the danger of death is postulated in canons 1043 and 1044 rather as one condition of the exercise of the faculty of dispensing than as a cause sufficient of itself for dispensation. The further condition demanded in canon 1043: "*ad consulendum conscientiae et, si casus ferat, legitimationi prolis*", may, in conjunction with the danger of death, be regarded as both a condition of, and as a grave and just cause for, dispensation. If by the term "*in casu urgentiori*" is included all that canon 1045 demands for the different situations enumerated, it may be regarded as a sufficient cause for dispensation.

" Bangen, *De Spons. et Matr.*, Tit. IV, p. 21; Vlaming, *Prael. Iuris Matr.*, n. 216; Petrovits, *New Church Law on Matrimony*, nn. 190, 245; Gasparri, *De Matr.*, n. 504; Cappello, *De Sacram.*, III, n. 314; Winslow, *Vicars and Prefects Apostolic*, p. 105; Augustine, *Commentary*, V, p. 147; Farrugia, *De Matr.*, n. 133; Leitner, *Lehrb. des kath. Eherechts*, p. 238; De Smet, *De Spons. et Matr.*, n. 506; Cerato, *Matr.*, n. 55; Konings-Putzer, *Comment. in Facult.*, p. 382. Vlaming (*loc. cit.*) cites two other causes which may, however, be grouped with the cause cited above. They are: 1. "*Si matrimonium mixtum finem imponet turpi concubinatui nubere cupientium*"; 2. "*si per matrimonium mixtum obtineri poterit, quod proles, ex partium fornicatione sive iam nata, sive nascitura, catholice baptizetur et educetur.*"

in a given region, provided that Catholics are secure and free in professing their religion."

3. If a mixed (or disparate) marriage is the only means whereby children born of another mixed or disparate marriage will be educated in the Catholic Faith."

4. Danger of apostasy of the Catholic party if the dispensation is denied."

5. Danger of civil marriage, or of contracting before a non-Catholic minister."

6. The cause of conversion:

a) A probable hope that a favorably disposed non-Catholic family will come into the Church through a mixed or disparate marriage."

b) A written promise, or an oral promise before

* The delegated faculty of dispensing from the impediment of Disparity of Cult was given in the past to Ordinaries of missionary regions on the condition that it could be used only in those regions where infidels outnumbered Catholics. (See No. 77, note 1). Cf. Gasparri, *op. cit.*, n. 699; Petrovits, *op. cit.*, n. 243. On the other hand it is not altogether clear that this condition of itself was regarded as a canonical cause for dispensation even in missionary regions. Modern authors, however, apparently regard it as a canonical cause. Cf. Vlaming, Cappello, Winslow, Leitner (isti auctores *loc. cit.*); Zitelli, *De Dispens. Matr.*, p. 60; Petrovits, *op. cit.*, nn. 190, 245; Gasparri, *op. cit.*, n. 504; Giovine, *De Dispens. Matr.*, Tom. 1, § CLXXIII, n. 4; Wernz, *Ius Decret.*, IV, n. 586, not. 31; Vermeersch-Creusen, *Epitome*, II, n. 331; Konings-Putzer, *op. cit.*, p. 383. Vide etiam S. C. S. Off., 12 Jan. 1769, n. I.—*Fontes*, n. 822.

** Bangen, Vlaming, Petrovits, Gasparri, Cappello, Winslow, Augustine, Farrugia, Leitner, De Smet (isti auctores *loc. cit.*); Lehmkuhl, *Casus Consc.*, II, n. 911; Konings-Putzer, *op. cit.*, p. 382. With reference to the *cautiones* in such cases see Nos. 344-352.

*** Cf. Leitner, Augustine, Vermeersch-Creusen, Vlaming (isti auctores *loc. cit.*). These authors seem to suggest an intimate relation between this cause and the cause, "*Periculum matrimonii civilis, vel coram ministro acatholico celebrandi*." There may be a close relation in some specific instances, yet it is quite manifest that the two causes are not synonymous. Feije (*De Imped. et Dispens.*, n. 666) calls attention to one significant point in connection with the cause under discussion: "*Affirmat Kutschker, t. 5, p. 222. Greg. XVI constanter denegasse dispensationem iis qui minabantur se defecturos a fide nisi concederetur*."

*** See No. 283, notes 18 (causes n. 11, 13), and 20 (causes n. 24-25), and also the authors mentioned in the preceding note (No. 290, not. 51). Cf. Konings-Putzer, *loc. cit.*; Conc. Plen. Balt. III (1884), n. 131.

*** Vlaming, Petrovits, Gasparri, Cappello (isti auctores *loc. cit.*). Cf. Bangen, *De Spons. et Matr.*, Tit. IV, p. 20-21; Farrugia, *De Matr.*, n. 133; De Smet, *De Spons. et Matr.*, n. 506; Konings-Putzer, *Comment. in Facult.*, p. 382.

witnesses, made by the non-Catholic party to embrace the Catholic Faith after the marriage."

c) Hope of the conversion of the non-Catholic party."⁵⁴

The last two causes, namely, the danger of civil marriage, and the cause of conversion, deserve special consideration since they are so frequently cited as a cause for dispensation for mixed and disparate marriages.

1. DANGER OF CIVIL MARRIAGE

291. On the ground that in almost every case the moral certainty of the fulfillment of the promises would have to be seriously questioned, Vlaming⁵⁵ draws attention to what he deems an inconsistency in citing for dispensation for mixed or disparate marriages the cause "danger of civil marriage, or of contracting before a non-Catholic minister." The objection he raises seems to draw its force from an assumption that the danger of contracting civilly or before a non-Catholic minister is so intimately connected with the *cautiones* that the presence of such a danger would offer almost an invariable obstacle to the moral certainty of their fulfillment. While this assumption may be substantiated in specific instances or particular localities, it may readily be challenged with reference to its sweeping generality. The existence of this cause is not necessarily accompanied by a reluctance to sign the promises; by any indication of in-

⁵⁴ Zitelli, *De Dispens. Matr.*, p. 60; Vlaming, *Prael. Iuris Matr.*, n. 216; Petrovits, *New Church Law on Matrimony*, nn. 190, 245; Gasparri, *De Matr.*, n. 504; Cappello, *De Sacram.*, III, n. 314; Giovine, *De Dispens. Matr.*, Tom. I, § CLXXIII, n. 5; Winslow, *Vicars and Prefects Apostolic*, p. 105; Wernz, *Ius Decret.*, IV, n. 586, not. 31; Wernz-Vidal, *Ius Canonicum*, V, n. 178, not. 30; Leitner, *Lehrb. des kath. Eherechts*, p. 237.

⁵⁵ Among the authors the subheadings of *a*, *b*, and *c* have appeared as separate causes though no one author consulted has listed all three as distinct causes. Each author, while accepting one or two of these subheadings, invariably remains silent as to a third possibility, though each individual subheading seems to be sponsored by a sufficient number of approved authors who urge it as a sufficient cause. In the present study, these three grounds, though apparently sufficient of themselves, are grouped under the one general heading "The cause of conversion". The relation between them is intimate enough to justify this grouping, and, on the other hand, the differences are sufficiently marked to warrant a separate discussion. See Nos. 296-300.

⁵⁶ *Prael. Iuris Matr.*, n. 216.

sincerity, or by a manifest desire of a civil or non-Catholic ceremony. More often the cause will spring from a determination to contract the marriage. True, if the Catholic party is an accomplice to the existence of this cause, or if his faith is so weak as to be easily the prey of the non-Catholic's insistence to contract the marriage at all costs, it does not redound to the character of the Catholic. Yet it is precisely the avoidance of a danger of civil marriage or one to be attempted before a non-Catholic minister that the Church will recognize as a cause for dispensation.

292. The existence of a danger of contracting before a non-Catholic minister will in many instances give rise to a graver suspicion of the insincerity of the promises, but its connection with the moral certainty of their fulfillment is not necessarily as intimate as the opinion of Vlaming would postulate. Primarily, the prohibition of canon 1063 rests upon an additional *communicatio in sacris* with heretics, not upon its connection with the promise. Nay more, by virtue of canon 1063, § 2, a double ceremony may even be tolerated for the gravest of reasons that are to be determined by the Ordinary.⁸⁷ Nor do canons 1063, § 2, and 1064, n. 3, in any way imply the invalidity of the dispensation upon a want of moral certainty regarding the fulfillment of the promises. On the other hand, the presence of a danger of a clandestine marriage upon the refusal of a dispensation should be carefully considered in relation to the moral certainty of the fulfillment of the promises in each particular case.

293. A more vital issue regards the very determination of the existence of this cause in particular cases. The cause may, indeed, arise in several ways. A certain locality may have this danger emphasized because of the small number of Catholics. Again, in a particular case, the parties may give such indications of their determination to marry that the danger of a clandestine marriage may be prudently judged to be present. It is a lamentable confession to be forced to admit that in this country the present cause is altogether too prevalent in many contemplated mixed and disparate marriages, but it does not on that account force the conclusion that it is, therefore, to be disregarded as a legitimate cause. *A fortiori* it does not support

⁸⁷ See No. 383.

the contention that because of its presence all dispensations should be denied."⁹⁹

294. No hard and fast rule can be laid down for determining the presence of this cause in a particular instance. A few general guides may, however, be given. If the parties explicitly manifest their determination to contract a marriage even if a dispensation were to be denied, and from a knowledge of the persons and the circumstances it is foreseen that they cannot be deterred from their purpose, the danger of a clandestine marriage is quite obvious. It is not necessary, moreover, that it exist in this marked degree. De Becker gives a sound warning to priests who wish to arrive at some certainty as to the objective existence of this cause, cautioning them not to provoke the parties to formal sin in this regard when they have not explicitly expressed this determination, but rather to form a prudent judgment as to its existence, mentioning in the petition that its existence is urged upon the judgment of the priest presenting the petition rather than upon the basis of any explicit statement of the parties."¹⁰⁰

295. Such is the nature of the cause that an absolute moral certainty of its existence is not necessary. A prudent suspicion or judgment as to its existence is sufficient."¹⁰¹ The priest who pre-

⁹⁹ The Third Plenary Council of Baltimore (n. 131) in repeating the constant insistence of the Church that just and grave causes must exist for dispensation for mixed marriages, continues: "*Hac in re attendenda etiam sunt locorum, rerum et personarum adiuncta, praesertim ubi periculum est gravioris mali, ne videlicet denegata dispensatione matrimonia mixta nihilominus, idque sine cautionibus clandestine contrahantur.*" Cf. Linneborn, *Grundriss des Ehe-rechts*, p. 286. At the time the Baltimore decree was enacted, mixed marriages could be contracted validly without the observance of the Tridentine form in most parts of this country. Now, that Catholics are strictly bound to the form, the Baltimore decree has, perhaps, lost some of its significance, yet it may still be accepted as a sound norm of advice. It is of far greater importance to center a real concern upon the present factors responsible for the existence of the cause than to speculate upon the effectiveness of a policy ignoring its existence. See *infra* Nos. 229-235.

¹⁰⁰ "*Vix etiam advertere opus est prudentem sufficere suspicionem de contrahentium intentione neque, ullo modo, provocandum esse, ex parte parochi, manifestationem huius malae intentionis: utiliter tamen, in libello supplici, adderetur periculum allegatum inniti personali parochi existimationi, si ita res se haberet.*"—De Becker, *De Spons. et Matr.*, p. 330.

¹⁰¹ The Congregation of the Propaganda cites the danger of a civil marriage as a legitimate cause and indicates that a complete moral certainty of its existence is not required: "*Ex dictis consequitur, PROBABILE periculum quod illi, qui dispensationem petunt, ea non obtenta, matrimonium dumtaxat CIVILE, ut aiunt, celebraturi sint, esse legitimum dispensandi causam.*"—S. C. de Prop. F., instr., 8 Maii 1877,—Coll., n. 1470. Chelodi (*Ius Matr.*, n.

sents the petition should state the reason for his judgment as to the presence of this danger, if this cause is cited merely as a result of his judgment. Though this cause, when taken singly, seems to possess a sufficient gravity upon which to grant a dispensation, it appears that in this latter case, where its existence is determined only upon the judgment of the priest and not on the confession of the parties, it should be supplemented by another or other causes to make up for a probable deficiency. The manifestation by the parties of this perverse intention would seem, indeed, to make the Catholic party quite unworthy of receiving a dispensation, yet in this matter the Church regards rather the possible and ultimate salvation of souls than the present bad disposition of the Catholic, and will grant a dispensation even in such circumstances.⁴⁶

2. THE CAUSE OF CONVERSION

296. The first phase of the cause of conversion, the probable hope of the conversion of a non-Catholic family, partakes of the nature of a public cause. The family is the natural and fundamental unit of society. Any factor that will affect a family must be estimated to be of at least a quasi public concern. A hope of the conversion of a non-Catholic family through a mixed or disparate marriage is consequently to be regarded as a public or at least a quasi public cause. It is the only phase of the cause of conversion that bears this public character.⁴⁷ It follows, of course, that the larger the group for which the hope of conversion exists, the greater the cogency of this cause.

46) has this to say: "*Probabile debet esse periculum, non certum, at non imaginarium. S. C. [Sacra Congregatio de Disciplina Sacramentorum] in simili casu adduxit: 'mala praevenienda ob firmitatem in proposito!'*" Cf. De Becker, *loc. cit.*

⁴⁷ "Quid si partes ultro et spontanee pessimam suam intentionem manifestarent contrahendi matrimonium mixtum vel coram ministro acatholico, nisi dispensatio eis concedatur? Haec sane dispositio efficit, ut tales catholici favorem dispensationis nullatenus mereantur: nihilominus, cum suprema semper urget ratio salutis animarum, praedicta circumstantia non impedit necessario, quominus gratia adhuc concedatur."—De Becker, *op. cit.*, p. 330. "Nec obstat mala dispositio dispensationem sollicitantium, sed potius complet."—De Smet. *De Spons. et Matr.*, n. 826. There is a distinct difference between the threat of apostasy and the threat of a clandestine marriage, and it is not to be assumed that the Church's policy in refusing to dispense for the former (see No. 290, note 51), will likewise be maintained in the latter.

⁴⁸ Vermeersch (*De Form. Facult. S. C. de Prop. F.*, p. 91) lists also "*spes conversionis partis acatholicae*" as a public cause.

297. The written promise, or oral promise of conversion made before witnesses, is well recognized by canonists as a just and grave cause. This phase of the cause of conversion is definite enough to preclude the necessity of further discussion. The hope of the conversion of the non-Catholic party as a factor or cause inclining the Church to dispense for mixed marriages, has apparently been recognized since the beginning of the seventeenth century. Early diocesan statutes of this period warned pastors not to join Catholics in marriages with heretics unless there existed some hope of conversion.⁸² A hope of the conversion of the non-Catholic, and a remote danger of the Catholic's defection, were among the causes urged for a dispensation granted by Pope Urban VIII on March 8, 1633.⁸³ In this case, however, this cause was really of a public nature since it turned upon the conversion of a member of the royalty, Catherine Charlotte of Zweibrücken. The same Pontiff decreed that Catholics who had married heretical women might, at the judgment of the Ordinary, continue cohabitation as long as there was some hope of conversion and an absence of the danger of perversion.⁸⁴ On the other hand, a decision of the Congregation of the Holy Office of February 15, 1780, seems to regard the hope of conversion as a *condition* of dispensation rather than as a cause.⁸⁵ There seems

⁸² "Die Statuta quatuor Dekanatum Juliae v. J. 1602 haben 'Pastores diligenter moneant suos, ne contrahant cum haereticis, nec coniungant aut copulent catholicas personas cum haereticis, nisi sit aliqua spes conversionis'."—Binterim, *Denkwürdigkeiten*, VII, II, p. 33. The statute does not seem to imply the necessity of formal dispensation,—a silence or an omission more readily understood if the prevalent opinion of many canonists and theologians, of that, and a later period, be considered. See *infra* No. 81, notes 13-14; No. 82.

⁸³ "Et primum eius, quae proponitur, educate rationis ab unanimi Principum, et Praelatorum, quibus carum Regionum explorati mores esse debent, asseveratione, nullum ex hoc Matrimonio rite permissio Fidei Catholicae in iis locis fieri praeiudicium; nullum in ipso Wolfango, eiusque liberis, aut subditis subversionis periculum subesse, quin potius magnam effulgere spem conversionis ipsius Catherinae ad Avitam Romanam Fidem . . ." Urbanus VIII, 8 Mart. 1633.—Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 210. According to Schulte (*Handb. des kath. Eherechts*, p. 252) these were the principal causes of this dispensation.

⁸⁴ Urbanus VIII, 14 Mart. 1630.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 712. This instance represents more a toleration of an already existing valid mixed marriage than a cause for dispensation.

⁸⁵ ". . . Erit proinde e munere ipsius Vicarii Ap. facultatem, quae sibi adesse ac perdurare supponitur, dispensandi super disparitate cultus, iis tantum prudentibus ac piis in sua Missione laborantibus sacerdotibus subdele-

to be little question, however, that the hope of conversion may be regarded as a sufficient cause. Cardinal Masella's list of causes for matrimonial dispensations includes the cause: "*Propter spem conversionis compartis ad catholicam religionem.*"¹⁷ There are several well known authors who apparently regard it as a sufficiently just and grave cause so that it may be accepted.¹⁸

298. What, then, is a hope of conversion? In a certain sense, the Church has a hope of converting the world, but obviously so large a comprehension of the term will be unacceptable as a cause for dispensation. Again a hope of conversion is not to be confused with a *wish* that the non-Catholic be converted. A mere wish for the non-Catholic's conversion is a purely subjective element and cannot be urged as an objective cause for dispensation. Nor can a hope of conversion be said to rest in the non-Catholic's signing of the "promises" and the attendant moral certainty of their fulfillment. The Church will not regard the *cautiones* as a cause for dispensation but demands them rather as a *conditio sine qua non*.¹⁹

gare, qui neminem fidelium permittant matrimonium contrahere cum infideli, ni viderint antea graves illas causas concurrere in singulis plane casibus expetendas, quas accurate inspicere iubet Apostolica Sedes, atque illud maxime caverint quod pars infidelis, nisi spem suae conversionis praeberit, saltem sine contumelia Creatoris et christiani nominis iniuria sit cum parte fidei cohabitatura, nec ullatenus impeditura educationem prolis utriusque sexus in sancta religione."—S. C. S. Off. (Sutchuen.), 15 Feb. 1780.—*Fontes*, n. 840. In this decision the causes seem to be distinguished from the hope of conversion or the absence of any contumely of the Creator.

¹⁷ See No. 283, note 20 (cause n. 17).

¹⁸ Pirhing (*Jus Can.*, Tom. IV, Tit. I, Sect. VI, n. 166) regards the hope of conversion as a grave cause. Ballerini-Palmieri (*Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 721) lists it among three of the gravest causes. Wernz (*Jus Decret.*, IV, n. 586, not. 31) and Wernz-Vidal (*Jus Canonikum*, V, n. 178, not. 30) demand the existence of a well-founded hope ("*spes fundata*"), and seem to classify it among the causes of lesser importance which, when added to other causes, move the Holy See to dispense more readily. Konings-Putzer (*Comment. in Facult.*, p. 382) regards it as a private cause and demands a "*magna spes conversionis*". Vermeerach (see infra No. 296, note 62) regards it as a public cause. Hilling (*Das Eherecht des C. I. C.*, p. 70) classifies "*spes conversionis*" (which he selects from Cardinal Masella's list) as a *causa honesta*. Other authors recognizing the hope of conversion as a cause, but offering little or no commentary, are: Lehmkuhl, *Theol. Mor.*, II, n. 715; Göpfert, *Moraltheologie*, III, n. 243 (who recognizes it in connection with the impediment of Disparity of Cult); Perathoner, *Das kirch. Gesetzb.*, p. 319, not. 1; Cerato, *Matr.*, n. 55. Vide etiam *AKKR*, XIV (1865), 324.

¹⁹ Cf. S. C. de Prop. F., litt. encyl., 11 Mart. 1868.—*Coll.*, n. 1324 (see infra No. 279, note 9); Conc. Plen. Balt. III (1884), n. 131; Wernz.

299. No hard and fast rules can be laid down for determining the presence of this cause in a particular instance though a number of leading considerations can be indicated which may serve as a guide. A careful estimation of the character and disposition of the non-Catholic party is of primary importance, though the influence of the Catholic party over the non-Catholic must likewise be weighed. Some consideration should dwell also upon the influence that the relatives and close associates of either party will have after the marriage has been contracted. Such factors as a willingness to take instructions before the marriage, or in some instances a promise to take instructions after the marriage, a genuine interest in Catholic beliefs and practices, a decided absence of bigotry, which can at times be determined by the type of questions asked about Catholic beliefs and practices, or from a general attitude toward the Church,—may contribute to the determination of the presence or absence of the cause of conversion. It is to be remembered that in this study the hope of conversion of the non-Catholic party is distinguished from the formal or solemn promise of conversion. Ultimately, therefore, the priest who has charge of the case must weigh the elements that he finds present, and, if he deems the cause of conversion to exist, he must present in sufficient detail the grounds upon which he urges the cause of a hope of conversion, so that the one dispensing may judge of its existence.

300. Must the hope of conversion of the non-Catholic be "well-founded" or is it sufficient that the hope be merely a probable hope? While, indeed, a probable hope of the conversion of a non-Catholic *family* suffices, because of the quasi public nature of the cause, it appears that more should be required than a mere probability of the conversion of the non-Catholic party alone. A "well-founded" hope of the conversion of the non-Catholic party seems to be demanded if the distinction between a hope of the conversion of a non-Catholic family and the non-Catholic party is to be fully justified. It is the one who dispenses who is to judge of this quality and this judgment can be formed from the details that should be presented in the petition.

Ius Decret., IV, n. 510, not. 42; Wernz-Vidal, *Ius Canonicum*, V, n. 273, not. 47; Bangen, *De Spons. et Matr.*, Tit. IV, p. 20; Chelodi, *Ius Matr.*, n. 59.

ART. IV. CAUSES REQUIRED FOR PASTOR'S ASSISTANCE AT MARRIAGES PROHIBITED BY CANONS 1065 AND 1066

301. A grave cause is explicitly demanded that an Ordinary may permit a pastor to assist at the marriage of a Catholic with anyone of the following: those who notoriously have left the Faith; those who are members of a society condemned by the Church;⁷⁰ those who are public sinners, or those notoriously under censure.⁷¹ Most of the causes that are commonly cited by the authors as having a more immediate reference to such cases, and possessing a sufficient gravity for the removal of the prohibition, have already been discussed in connection with the impediments of Mixed Religion and Disparity of Cult. The causes that are usually cited as sufficient are: to save the Catholic party from some great evil;⁷² to prevent scandals that would follow upon the refusal of this permission;⁷³ to avoid the danger of concubinage;⁷⁴ or to prevent a civil marriage. Since these prohibitions are not in the form of a canonical impediment, other causes that are not always recognized as canonical may also be urged, though several will have to concur to possess a sufficient gravity.⁷⁵

302. A cause of lesser gravity may be admitted to permit the assistance of the pastor at marriages forbidden in canon

⁷⁰ Canon 1065, § 2. Here are included also those baptized non-Catholics who have never professed the Catholic Faith but who, having been baptized or having attained membership in a non-Catholic religious sect, have formally renounced their membership in that sect and have become members of no other religious sect.

⁷¹ Canon 1066.

⁷² If the marriage will prevent a grave evil from falling upon the pastor or the parish, it may likewise be urged as a cause. Cf. Chelodi, *Ius Matr.*, n. 67; Cappello, *De Sacram.*, III, n. 332; Wernz-Vidal, *Ius Canonicum*, V, n. 203; Vlaming, *Prael. Iuris Matr.*, n. 249; S. Poenit., 10 Dec. 1860.—Feije, *De Imped. et Dispens.*, n. 277; S. C. S. Off. (Leodien.), 30 Jan. 1867.—*Fontes*, n. 998; 17 Sept. 1871.—*AKKR*, XXVII (1872), CLXXI; instr. (ad Ordinarios Imperii Brasil.), 2 Jul. 1878.—*Fontes*, n. 1056.

⁷³ See the preceding note.

⁷⁴ De Smet, *De Spons. et Matr.*, n. 196; Chelodi, *loc. cit.*; S. C. S. Off. (Portus Aloysii), 1 Aug. 1855.—*Fontes*, n. 932; (Marysville), 21 Aug. 1861.—*Fontes*, n. 967.

⁷⁵ The following selection, with certain modifications, is made from a list given by Farrugia, *De Matr.*, n. 106: *Ex parte oratricis catholice: ex natalibus illegitimis orta; infirmitate, deformitate aliove defectu detenta; iam ab alio deflorata est. Ex parte oratoris catholici: si infirmitate detentus; si viduus prole oneratus; si adiutorio huius mulieris indigens est, e. g. ad gerendam rem domesticam. Ex parte matrimonii: omnia ad nuptias iam parata; oratoris catholici vel oratricis catholice munificentia erga bonum publicum.*

1066⁷⁶ than those prohibited in canon 1065⁷⁷ for the presumption of danger to the faith of the Catholic party and the children is normally less grave in the former than in the latter case. A graver cause is required if both of the parties be public sinners.⁷⁸ Whatever proportions of gravity may be recognized as existing between the prohibitions of canons 1065 and 1066, either with reference to their wording and context, or with reference to the gravity of the matter determining the prohibition, it is the Ordinary and not the pastor who is to judge of the gravity of the causes as they exist in the particular circumstances of each case. Regardless of the gravity of the cause, if both parties to the proposed marriage have notoriously fallen away from the Faith, or are sectless non-Catholics, or if both of the parties are notorious members of condemned societies and refuse to be reconciled with the Church, the Ordinary is to refuse permission for the pastor's assistance. Canon 1065, § 2, presupposes that one of the parties be a professed Catholic at the time of the marriage when it prescribes: "*dummodo . . . pro suo prudenti arbitrio Ordinarius iudicet satis cautum esse catholice educationi universae prolis ET REMOTIONI PERICULI PERVERSIONIS ALTERIUS CONIUGIS.*"⁷⁹

⁷⁶ The gravity of the required cause is increased, however, if the person notoriously excommunicated be a *vitandus*.

⁷⁷ The difficulties of observing this norm in practice have already been indicated in No. 286.

⁷⁸ Cf. Wernz-Vidal, *Ius Canonicum*, V, n. 202.

⁷⁹ Vide etiam S. C. S. Off. (Leodien.), 30 Iun. 1867,—*Fontes*, n. 998; 17 Sept. 1871,—*AkKR*, XXVII (1872), CLXXI; (Bombay), 21 Feb. 1883,—*Fontes*, n. 1079; S. C. Conc., 27 Nov. 1896,—*AkKR*, LXXVIII (1898), 523-524.

CHAPTER XIII

THE CAUTIONES

ART. I. CATHOLIC EDUCATION OF THE CHILDREN AND THE PRIMARY END OF MARRIAGE

303. A few of the older canonists were of the opinion that if a marriage were contracted with an agreement (given as a very condition of matrimonial consent) to rear the children in a non-Catholic religion, the marriage itself would be invalid because of the opposition of the agreement to the *bonum prolis*.¹ It has, however, been the teaching of the great majority of the authors that no such effect can be attributed to an agreement of this kind, even though it be placed as an essential condition of the matrimonial consent.²

304. Although both procreation and education of children constitute the primary end of marriage,³ it does not follow that a pact (even when entered upon as a formal condition of matrimonial consent) to frustrate or to hinder the Catholic education of the children will render the marriage itself invalid. If both procreation and education are considered in relation to each other, it will be evident that education is contingent upon and subordinate in relation to procreation, for the education of a child is consequent upon and contingent to its procreation. Again, while procreation does not in a logical sense admit of

¹ Schmalzgrueber, *Jus Eccl. Univ.*, Tom. IV, P. II, Tit. VI, n. 150; Mazzei, *De Matr. personarum div. Relig.*, cap. II, § XX.

² Perez, *De Matr.*, Disp. XXXVI, Sect. I, n. 2; Frassen, *Scotus Academicus*, Tom. XII, Tract. III, Disp. ult., art. III, § VIII; Gury, *Theol. Mor.*, Pars II, n. 828; Feije, *De Matr. Mixtis*, p. 161-169; Blicck, *Theol. Univ.*, IV, p. 245; Gasparri, *De Matr.*, n. 498; Wernz, *Jus Decret.*, n. 577, not. 16; n. 587; Cappello, *De Sacram.*, III, n. 315, not. 28; Farrugia, *De Matr.*, n. 52. Pichler (*Jus Can.*, Tom. I, Lib. IV, Tit. I, n. 131) uses an unusual argument based, as he says, upon the tolerance of the Church of such pacts: "... reclamatur insuper communis Doctorum, imo et Ecclesiae tolerantia, dum videbimus, saltem in Germania nostra, saepius iam fuisse contracta, et hodie, quamvis impie, sub dicta conditione contrahi Matrimonia, imo ordinarie sub tali conditione tacita."

³ Cf. canon 1013, § 1.

degrees of perfection, since by the marriage contract it is based upon the *ius coniugale* which is absolute and unlimited,—education, on the other hand, does admit of many degrees of perfection. Thus for example, the physical, intellectual, and moral elements constitutive of education admit of a great scale of gradation. In the moral and intellectual order, religious education normally represents a higher perfection than a mere natural morality. Catholic religious education, which again admits of many degrees of perfection, represents, indeed, the ideal of perfection, yet its frustration does not of itself preclude all moral and intellectual development, but rather its perfection.* But this degree of perfection is not of itself, and *per se*, the sole and only constitutive element of education. A violation of a perfection does not, therefore, destroy that of which it is not the sole constitutive element. Since, moreover, education in its entirety is in itself only one of two elements constituting the primary end of marriage, and again, since it is contingent upon the element of procreation,—a violation of a perfection of a contingent element of the primary end of marriage does not destroy the primary end of marriage, and hence an agreement to violate this perfection does not invalidate the marriage.

ART. II. OBLIGATION UPON CATHOLICS TO EDUCATE THEIR CHILDREN AS CATHOLICS

305. The obligation upon Catholics to raise their children as Catholics is, indeed, one that they cannot renounce. Any agreement entered into by a Catholic to raise any or all of the children as non-Catholics is a clear violation of the divine and natural law and possesses no binding force whatever.⁵ Catholics

* "... nam ad matrimonii substantiam pertinet bonum proles *naturale*, non vero bonum spirituale: bonum naturale curare tenentur qua coniuges, bonum vero spirituale, qua christiani . . ."—Blieck, *Theol. Univ.*, IV, p. 245.

⁵ The authors are agreed that such pacts are devoid of validity. Cf. Sanchez, *De Matr.*, Lib. VII, Disp. 72, n. 6; Navarrus, Lib. I *Consiliorum*, consil. 1, nn. 62-63,—*Op. Omnia*, Tom. V; Reiffenstuel, *Jus Can. Univ.*, Lib. IV, Tit. I, n. 371; Blieck, *Theol. Univ.*, IV, p. 245; Cappello, *De Sacram.*, III, n. 315. Schmalzgrueber (*Jus Eccl. Univ.*, Tom. IV, P. II, Tit. VI, n. 151), however, concedes a rather strange exception: "Excipiatur, si aliunde huiusmodi matrimonium licitum fiat, eo quod v. gr. per illud speretur promovendum bonum publicum; tunc enim si spes non sit, ut maritus haeret-

who contract marriage with either an explicit or an implicit pact that all or any of their children will be educated outside of the Catholic Church incur *latae sententiae* an excommunication reserved to the Ordinary.⁶ In order to incur the censure, however, an agreement must be entered into either before or at the time of the marriage.⁷ The censure is incurred, not when the pact is made, but when the marriage is contracted, either with the perseverance of the agreement or its concomitant entry at the time of the marriage,—otherwise the condition mentioned in canon 2319, § 1, n. 2, "*Qui matrimonio uniuntur cum pacto explicito vel implicito*", would not be verified.⁸

306. Petrovits is of the opinion that the term "*matrimonium*" in canon 2319, § 1, n. 2 must be taken in its strict canonical sense, implying a valid contract.

Therefore, the Catholic who would attempt marriage before a non-Catholic clergyman incurs only one excommunication. He would not incur another censure because the marriage was attempted with an explicit understanding that one or all of the children should be brought up outside of the Church . . . In the case given, the mar-

icus permittat omnes liberos in catholica religione educari, hoc casu non videtur esse illicitum in pactis coniugalibus talem conditionem adiciere, ut saltem aliqua pars liberorum in fide catholica educetur, et instruat; salvo tamen iure matris catholicae, ut etiam ceteros liberos, quantum fieri poterit, in vera religione instruere, ut tenetur, non praetermittat." Vide etiam Pirhing, *Jus Can.*, Tom. IV, Tit. I, Sect. VI, n. 167.

⁶ Canon 2319, § 1, n. 2.

⁷ Cappello, *De Censuris*, n. 370. Cerato, *Censurae*, n. 47, e; Farrugia, *Comment. in Censuras*, n. 47; Cipollini, *De Censuris*, Lib. II, n. 71.

⁸ Cipollini, *loc. cit.*; Ayrinhac, *Penal Legislation*, p. 208; Pighi, *Censurae*, n. 103; Vermeersch-Creusen, *Epitome*, III, n. 518. Cerato (*Censurae*, n. 47, e) is the author of the following statement: "*Procul dubio tollitur censura, si tollatur ipsum pactum antequam matrimonium fiat*", to which Cappello (*De Censuris*, n. 370) takes exception in the following words: "*Quod minus recte affirmatur. Sane vel censura est incursa, vel non; si est incursa, cessare nequit nisi per absolutionem; si non est incursa, non potest tolli. Eo ipso quod nupturientes huiusmodi pactum inierunt, censuram contraxere, quae pacto revocato, non cessat, sed more ordinario i. e. absolutione auferri debet.*" While the wording employed by Cerato is subject to criticism, Cappello's conclusion seems likewise to be somewhat of an overstatement. When he says that the censure is incurred at the moment the pact is made, he does not seem to provide for the event of the marriage never taking place, a condition apparently demanded by the clause "*qui matrimonio uniuntur*",—not merely the agreement without the marriage. The pact does not entail a censure unless it is completed with the actual contracting of the marriage. Cf. Leech, *The Constitution "Apostolicae Sedis"* and the "*Codex Juris Canonici*," p. 94.

riage being invalid, the understanding with which it is attempted does not occasion another censure. If in such a marriage the consent was given before a priest and subsequently renewed in presence of a non-Catholic minister, the Catholic party incurs a double excommunication.*

307. While it is true that the censure deals *in odiosis* and should, therefore, be strictly interpreted, it is doubtful whether the interpretation given by Petrovits can be sustained. There is no clear evidence that the clause "*qui matrimonio uniuntur*" is to be understood as referring to a valid marriage. Number one of the first paragraph of the same canon has the clause, "*Qui matrimonium ineunt coram ministro acatholico*", which in no sense implies a valid marriage. Neither the wording of the section of the canon under consideration, nor the context of the entire canon manifests a patent transition from the term "*matrimonium*" used in the sense of a "*matrimonium attentatum*" to the same term understood in the sense of a "*matrimonium verum*". On what ground is a putative marriage excluded, or a union bearing the "*species matrimonii*"? It does not appear in any way obvious that a marriage attempted before a priest without a dispensation from a diriment impediment (for example, either because it was not disclosed, or because it was unknown to the parties) would on the score of its objective invalidity render the parties immune from the censure.¹⁰ Neither is it evident, therefore, that such an agreement made in connection with an attempted marriage before a non-Catholic minister or civil official does not bring upon the Catholic party the censure of canon 2319, § 1, n. 2.¹¹

* *New Church Law on Matrimony*, n. 270, Cappello (*loc cit.*) is of the same opinion: "*Intelligitur matrimonium verum seu religiosi, sive mixtum sit sive non.*"

¹⁰ The supposition is, of course, that the impediment is later discovered before the question concerning the censure is to be disposed of.

¹¹ A further doubt regarding the benign interpretation may, perhaps, be derived from the answer of the Holy Office of August 29, 1888 (*NRT*, XXII [1890], 137) to the following *dubia*: "1. *Utrum absolutio a censuris omnibus catholicis, qui coram haeretico ministro nuptias contraxerunt, necessaria sit, an potius in eo tantum casu impertienda sit, quo in huiusmodi celebrationem ab Antistite censurae promulgati sint? Et quatenus negative ad primam partem, quaeritur: 2. Utrum absolutio a censuris necessaria sit eis saltem, qui, in huiusmodi nuptiis, consenserunt acatholicae prolium educationi?*"

308. An implicit agreement is quite sufficient to contract the censure. Such an agreement may readily be present in a Catholic's promise, for example, not to oppose the wishes of the other with regard to the education of the children outside of the Catholic religion, or in an agreement to conform to the custom of a region where the boys follow the religion of the father and the girls that of the mother." The clause "*ut omnes vel aliqua proles educetur extra catholicam Ecclesiam*" has, perhaps, more of the connotation of an education in a non-Catholic religion, though it seems to include also an agreement to deprive the child of a Catholic education.¹⁸

309. There are further censures incurred by Catholic parents who are responsible for the non-Catholic Baptism or non-Catholic religious education of their children. Catholics who knowingly presume to present their children to non-Catholic ministers for Baptism incur *latae sententiae* an excommunication reserved to the Ordinary.¹⁹ One or both parents, if both are Catholics, can incur this censure if it concerns their own children ("*liberos suos*"). Full knowledge of the law, the censure, and the fact that the person to whom the child is presented is a non-Catholic minister in the strict sense of the term²⁰ is implied to incur the censure. The question of the validity of the Baptism is not the one of primary concern as far as there is question of incurring the censure, but rather the *communicatio in sacris* with non-Catholic ministers.²¹ A censure incurred *latae senten-*

R. Ad 1. *Affirmative ad primam partem, negative ad secundam.*

Ad 11. *Provisum in primo.*"

Vide etiam S. C. S. Off., 8 Maii 1907,—*Fontes*, n. 1282. Does the answer to the second *dubium* imply that only one censure is incurred by reason of the fact of the attempted marriage before a non-Catholic minister, or does it not perhaps imply that the agreement to bring up the children as non-Catholics in such attempted marriages has entailed a censure that must be absolved? Frankly, the answer scarcely permits a definite solution, but it may readily indicate the doubtful value of the benign interpretation which would restrict the term "*matrimonium*" to valid marriages contracted before a priest.

¹⁸ Ayrinhac, *Penal Legislation*, p. 208; Augustine, *Commentary*, VIII, p. 298.

¹⁹ Cf. Augustine, *op. cit.*, VIII, p. 299. Cappello (*De Censuris*, n. 370) and Vermeersch-Creusen (*Epitome*, III, n. 518) seem to restrict the interpretation to education in a non-Catholic religion.

²⁰ Canon 2319, § 1, n. 3.

²¹ Cf. Cappello, *op. cit.*, n. 372; Ayrinhac, *op. cit.*, p. 208.

²² Leech, *op. cit.*, p. 95.

tiae and reserved to the Ordinary is contracted also by Catholic parents, or Catholics holding their place, who knowingly offer their children to be educated or brought up in a non-Catholic religion." Ignorance, either crass or supine, whether of the law, the censure, or the nature, for example, of the instruction the children are to receive in a school or from a tutor, will again excuse from incurring the censure.

310. The violations of parental obligations that have been referred to, not only subject the Catholic party to the censures incurred *latae sententiae* and reserved to the Ordinary, but also render such Catholics "*suspecti de haeresi*," which makes them subject to the rulings of canon 2315. To the end, therefore, that she will have an assurance of the absence of the danger of the non-Catholic education of the children, the Church demands for mixed and disparate marriages a promise on the part of both the Catholic and the non-Catholic party that the children will be baptized only in the Catholic Church and that they will receive their religious education exclusively in the Catholic Faith."

ART. III. SUMMARY HISTORY OF THE *Cautiones*

311. From time immemorial, the Church has repeated again and again the need of vigilance lest Catholics contract marriages with aliens to the Faith in violation of the divine and natural law. The enactments of early councils¹⁷ to the effect that Catholics were not to marry heretics, infidels, and Jews unless these became converts to the Catholic Faith, represented a measure adapted for that period to ward off the imminent danger of perversion.¹⁸

312. When the exigencies of missionary conditions, that arose in the sixteenth century and after, forced the necessity of dispensations from the impediment of Disparity of Cult, the

¹⁷ Canon 2319, § 1, n. 4.

¹⁸ Canon 2319, § 2.

¹⁹ Canon 1061, § 1, n. 2. Regarding the additional promise of the non-Catholic party, see No. 341.

²⁰ Elvira (306), can. 16.—Mansi, II, 8; Laodicea (343-381), can. 31.—Mansi, II, 569; Chalcedon (451), can. 14.—Mansi, VII, 388.

²¹ It is not certain whether this conversion was always demanded as a condition to be fulfilled antecedently to the marriage. In many instances, perhaps, the promise of a future conversion was accepted as a sufficient surety.

Church again insisted that such dispensations could not be given unless the conditions required by the divine law were fulfilled.²² In Europe, dispensations from impediments existing between Catholics and heretics were refused by the Holy See unless the abjuration of heresy preceded.²³ For a long time the only admitted exception to this rule concerned the mixed marriages of the Catholic nobility, and for these, formal guarantees and sureties were strictly demanded.²⁴ When at last the *Stylus Curiae* of Rome was urged as a medium of reform for the laxities of discipline existing in many regions, definite and formal guarantees known as *cautiones* were exacted also for the mixed marriages of the common people.²⁵ Once these *cautiones* or formal guarantees providing against a danger of the perversion of the faith of the Catholic party and the children had become a part of the universal discipline of the Church, they were given such an emphasis that one might almost gather that they were of divine obligation.

ART. IV. RELATION OF THE *Cautiones* TO THE DIVINE AND NATURAL LAW

313. While the *cautiones* are founded on the conditions prescribed by the divine and natural law, they are, nevertheless, an ecclesiastical measure adopted to safeguard the divine law rather than a formal prescription of the divine law itself.²⁶ When, therefore, it is said that the *cautiones*, because of their foundation in the divine and natural law, cannot be dispensed from,²⁷ the term

²² See No. 77, note 1.

²³ See No. 79.

²⁴ See Nos. 84-95.

²⁵ See Nos. 99-101.

²⁶ "Quae *cautiones* licet quandoque cum *conditionibus confundantur*, tamen evidenter ab iisdem distinguuntur, sicuti *media* ad obtinendum triplitem *finem* scilicet avertendi periculum perversionis in coniuge catholico, obtinendi educationem catholicam universae proles, procurandi conversionem partis acatholicae, quae ex lege caritatis a coniuge catholico serio et prudenter promovenda est."—Wernz, *Ius Decret.*, IV, n. 587, not. 32. Cf. Wernz-Vidal, *Ius Canonicum*, V, n. 179, not. 31; Cappello, *De Sacram.*, III, n. 309; De Smet, *De Spons. et Matr.*, p. 441, not. 3; O'Keefe, *Matrimonial Dispensations*, p. 85; Kelly, *The Jurisdiction of the Simple Confessor*, p. 93.

²⁷ "Quae quidem *cautiones* remitti seu dispensari numquam possunt, cum in ipsa naturali ac Divina lege fundentur, quam Ecclesia et haec Sancta Sedes

"cautiones" must be understood rather in the sense of "conditiones" or "cautelae" demanded by the divine and natural law than the actual formalities of the promises themselves.⁸⁰ To maintain that the Church *cannot* dispense from the exacted formalities of the guarantees, the "*cautiones opportuna*", is to overlook the fact of their ecclesiastical origin,⁸¹ and to forget that by an extraordinary dispensation granted through a *sanatio in radice* the Church does at times dispense from the normal means which she has established to safeguard the divine and natural law.⁸²

ART. V. NECESSITY OF THE *Cautiones* FOR DISPENSATION

314. In her normal discipline, however, i. e., outside of the recourse to the *sanatio in radice*, the Church will grant no dispensation from the impediments of Mixed Religion and Disparity of Cult unless the *cautiones* or formal promises are given.⁸³ These *cautiones* have become the *conditio sine qua non* of dis-

sartam tectamque tueri omni studio contendit, et contra quam sine ullo dubio gravissime peccant, qui promiscuis hisce nuptiis temere contrahendis se ac prolem exinde suscipiendam perversionis periculo committunt. Insuper, in tribuendis huiusmodi dispensationibus, praeter enunciatas cautiones quae praemitti semper debent, et super quibus dispensari nullo modo umquam potest, adiectae quoque fuere conditiones, ut haec mixta coniugia extra ecclesiam . . . etc."—Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169. Vide etiam Card. Rampolla, litt. (ad Card. Simor), 26 Sept. 1890,—*NRT*, XXIII (1891), 388-391.

⁸⁰ "*Conditiones* omnino necessariae, quae ideo in promiscuis nuptiis requiruntur, quia in naturali ac divino iure fundantur, huiusmodi sunt, quae remitti seu dispensari nunquam possunt. Iure igitur meritoque factum est, ut mixtae nuptiae in ista dioecesi nunquam sint permittendae, uti refert, quin *hisce conditionibus* cautum prorsus fuerit."—S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Jan. 1871, n. 6,—*Fontes*, n. 1013. Vide etiam Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482; S. C. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 5,—*Fontes*, n. 1112.

⁸¹ "*Quam sane legem [naturalem divinamque] sartem tectamque tueri contendit Ecclesia et haec Apostolica Sedes, seu in generali ipsarum nuptiarum prohibitionem, seu in cautionibus, quas IURE SUO exigit.*"—Gregorius XVI, ep. *Non sine gravi*, 23 Maii 1846, n. 1.—*Fontes*, n. 503. Cf. Wernz, *Ius Decret.*, IV, nn. 585, 587; Wernz-Vidal, *Ius Canonicum*, V, n. 177; De Smet, *De Spons. et Matr.*, n. 590.

⁸² See Nos. 262-267.

⁸³ See No. 101, note 40 and in addition Aichner, *Compend. Juris Eccles.*, § 183, cum not. 10-11; Feije, *De Imped. et Dispens.*, n. 568; De Smet, *De Spons. et Matr.*, n. 590; (1909 ed.), n. 254; Blat, *Comment.*, Vol. III, P. I, n. 456; Genicot-Salsmans, *Theol. Mor.*, II, n. 514; LQS, LXXIX (1926), 806, 810.

pensation from either impediment²² so that the very validity of the dispensation depends upon the giving of the *cautiones*.²³

§ I. IN DANGER OF DEATH AND URGENT NECESSITY

315. An exception, however, is urged by some canonists and theologians in the case of danger of death. While all admit that *per se* the *cautiones* must be given even in such an extremity, a considerable number do not regard the *cautiones* in such cases as a *sine qua non* condition for the *validity* of the dispensation,²⁴ but hold it to be a solidly probable opinion that should the *cautiones* be refused by the non-Catholic party, the Ordinary can dispense validly and (*per accidens*) even licitly, as long as

²² Cf. Pius VIII, instr., 27 Mart. 1830,—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 724; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; Card. Rampolla, litt. (ad Card. Simor), 26 Sept. 1890,—*NRT*, XXIII (1891), 388-391; S. C. S. Off., 30 Jun. 1842, ad 4,—*Fontes*, n. 890; litt. (ad Card. Simor), 21 Jul. 1880,—*NRT*, XIX (1887), 4-9; (Leopoliensis), 18 Mart. 1891,—*Fontes*, n. 1132; 6 Jul. 1898,—*Fontes*, n. 1200; 12 Apr. 1899,—*Fontes*, n. 1219; 10 Dec. 1902,—*Fontes*, n. 1262; 21 Jun. 1912,—*AAS*, IV (1912), 442-444; Conc. Plen. Balt. III (1884), n. 131. A knowledge or hope of the good will of the parties, or good faith regarding the necessity of the *cautiones*, can in no way be urged as a substitute for the *cautiones*. Cf. S. C. S. Off., 21 Jul. 1880,—*NRT*, XIX (1887), 4-9; Wernz, *Ius Decret.*, IV, n. 587; Wernz-Vidal, *Ius Canonicum*, V, n. 179; Cappello, *De Sacram.*, III, n. 310; Blat, *Comment.*, Vol. III, P. I, n. 456; De Smet, *De Spons. et Matr.*, (ed. 1909), p. 309, not. 4; p. 310.

²³ Chelodi, *Ius Matr.*, n. 50; Vlaming, *Prael. Iuris Matr.*, n. 482; Wernz Vidal, *op. cit.*, n. 273, not. 46; Linneborn, *Grundriss des Ererechts*, p. 202, not. 3; Leitner, *Lehrb. des kath. Ehrechts*, p. 307-308; Farrugia, *De Matr.*, nn. 118-119; Ayrinhac, *Marriage Legislation*, p. 121-122, 153; Blat, *op. cit.*, Vol. III, P. I, nn. 435, 468; Augustine, *Commentary*, V, p. 186; Woywod, *A Practical Commentary*, I, nn. 1041, 1055; Noldin, *Theol. Mor.*, III, n. 578; Genicot-Salsmans, *Theol. Mor.*, II, n. 493; Sabetti-Barrett, *Theol. Mor.*, n. 881; Winslow, *Vicars and Prefects Apostolic*, p. 106-107; Kelly, *The Jurisdiction of the Simple Confessor*, p. 176, 184-186.

²⁴ De Becker, *De Spons. et Matr.*, p. 243-244; 278, not. 1; De Smet, *De Spons. et Matr.* (1909 ed.), p. 309, not. 5; De Smedt, in *LQS*, LXVII (1914), 384-385; O'Neill, in *IER*, XXVIII (1926), 633-635; Mahoney, in *AER*, LXXII (1925), 510; Cerato, *Matr.*, nn. 35-36; Figbi, *De Matr.*, n. 90; King, *The Administration of the Sacraments to Dying Non-Catholics*, p. 123-131; Cappello, *De Sacram.*, III, nn. 232, 310, 312; Petrovits, *New Church Law on Matrimony*, nn. 160, 192, 254-255; Farrugia, *De Matr.*, n. 83, d; Genicot-Salsmans, *Theol. Mor.*, II, nn. 493, 514; Vermeersch-Creusen, *Epitome*, II, nn. 306, c. 331, b; Vermeersch, *Theol. Mor.*, III, n. 759; O'Keefe, *Matrimonial Dispensations*, p. 85-92, 144-145; Kelly, *The Jurisdiction of the Simple Confessor*, p. 92-94, 185; Kubelbeck, *The Sacred Penitentiaria and its Relations to the Faculties of Ordinaries and Priests*, p. 64. Vide etiam Konings-Putzer *Comment. in Facult.*, p. 386-387; Ayrinhac, *Marriage Legislation*, p. 154-155.

the Catholic party is well disposed and the conditions of the divine law are fulfilled.

316. The arguments employed to defend this opinion may be summarized under the following headings.

1. The Church has always shown a disposition to relinquish the full rigor of her law regarding the *cautiones* in cases where a marriage has already been attempted, as is evident from an instruction of the Holy Office sent to the Vicar Apostolic of Sutchuen on January 12, 1769.²⁸ Again in a letter of the Congregation of the Propaganda of May 3, 1828, sent to the Apostolic Vicar of Tonkin,²⁹ a certain limited *cautio* was permitted concerning the Catholic education of a first born child or of the first male child born, or to be born, provided that the Catholic woman be at the point of death and that she give a promise that in case of recovery she would endeavor to convert the infidel party and to educate all the children in the Catholic Faith. The Holy See has, moreover, expressed its willingness to grant a *sanatio in radice* for invalid mixed or disparate marriages upon the non-Catholic's refusal of the *cautiones*, provided that the union could not be broken, that the consent persevered, and that the Catholic party would assume definite obligations.³⁰

2. The decision of the Holy Office of June 21, 1912,³¹ which permits the Ordinary, without recourse to the Holy See, to declare invalid a disparate marriage contracted without the *cautiones* has limitations which do not permit of its extension to canon 1043. It regards a delegated faculty, whereas canon 1043 has reference to ordinary jurisdiction. The decision, moreover, refers only to normal cases of dispensation, whereas canon 1043 refers to the danger of death. Finally the decision was given "*prout exponitur*" which indicates that in different circumstances a different answer might be given. If there is any circumstance which would warrant a different answer, surely it is the danger of death.

²⁸ *Fontes*, n. 822, ad II, 4. Vide etiam S. C. de Prop. F., 30 Jan. 1807. —Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 710.

²⁹ *Coll.*, n. 804.

³⁰ Cf. S. C. S. Off., 22 Aug. 1875, —*NRT*, XV (1883), 579-580; 20 Jan. 1892, —*ASS*, XXX (1897-1898), 383-384; 12 Apr. 1899, —*Fontes*, n. 1219.

³¹ *AAS*, IV (1912), 443.

3. While canon 1043 demands that the *cautiones* be given if a dispensation from the impediments of Mixed Religion or Disparity of Cult be granted,³³ this requirement is to be understood to mean,—“*in quantum fieri potest*”, instead of an absolute condition of validity. It will be sufficient for validity if those conditions demanded by the divine and natural law are adhered to absolutely.

4. The requirement of canon 1043 is put in the ablative absolute,—“*praestitis consuetis cautionibus*”, a fact, which, in view of the disagreement among the authors, does not necessarily involve a condition required for validity. In this connection, therefore, canons 11^a and 15^a must be kept in mind, and canon 39^a by way of analogy.

5. The *cautiones* are merely an ecclesiastical provision to safeguard the divine law. If in danger of death the divine law can be safeguarded in some other way (for example, if the non-Catholic party is at death's door) surely the Church will not urge her law. “*In extremis pereat lex.*” The opposite opinion would be entirely too rigorous.

6. Only a few authors who wrote before the Code discuss the issue in question, and these favored the more liberal opinion.

7. After the Code a sufficient number of authors subscribe to the opinion to make it solidly probable. Their number continues to grow. Vermeersch, who at first upheld the stricter view,³⁴ has now changed his opinion.³⁵

8. Since it cannot be denied that there is at least a *dubium iuris* concerning this question, dispensations granted in danger

³³ “... si dispensatio concedatur super cultus disparitate aut mixta religione, praestitis consuetis cautionibus.”—Canon 1043. Vide etiam S. C. S. Off. (Leopoliensis), 18 Mart. 1891,—*Fontes*, n. 1132.

³⁴ “Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus aut actum esse nullum aut inhabilem esse personam expresse vel aequivalenter statuitur.”—Canon 11.

³⁵ “Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent...”—Canon 15.

³⁶ “Conditiones in rescriptis tunc tantum essentiales pro eorundem validitate censentur, cum per particulas *si, dummodo*, vel aliam eiusdem significationis exprimuntur.”—Canon 39.

³⁷ *Epitome Juris Canonici* (1922 ed.), II, n. 348, d. This reference is found in O’Keeffe, *Matrimonial Dispensations*, p. 91, note 132.

³⁸ Cf. No. 315, note 34.

of death upon the non-Catholic's refusal of the *cautiones* must be regarded as valid by virtue of canon 209.⁴⁸

317. Notwithstanding the apparent cogency of these reasons, there are many authors who maintain that dispensations from the impediments of Mixed Religion or Disparity of Cult without the *cautiones* must always be regarded as invalid, and that the danger of death offers no exception to this rule.⁴⁹ Others, while apparently inclined to accept this opinion, state it with guarded phrase to the effect that such dispensations are either not certainly valid,⁵⁰ or that they are not certainly invalid.⁵¹ In view of this division of opinion it will be well to re-examine the evidence that may be used to interpret the meaning of the clause of canon 1043,—"*praestitis consuetis cautionibus.*" Such evidence may be classified as follows:

- 1) Decisions and instructions determining the law before the Code;
- 2) The opinions of authors writing before the Code;
- 3) The law of the Code expressed in canons 1043 and 1061, § 1;
- 4) The intrinsic merits of the opinions expressed by authors writing after the Code.

318. Since some of the authors who favor the more liberal opinion invoke decisions and instructions that refer to the discipline of the eighteenth century, it is necessary again to recall

⁴⁸ "In errore communi aut in dubio positivo et probabili sive iuris sive facti, iurisdictionem supplet Ecclesia pro foro tum externo tum interno."—Canon 209.

⁴⁹ De Smet, *De Spons. et Matr.*, nn. 505, 590; p. 518, not. 2; p. 644, not. 6 (also in English translation of the third latin edition [St. Louis, 1925], II, p. 32, not 3; p. 196, not. 6); Augustine, *Commentary*, V, p. 101-102; *The Pastor*, p. 131; Noldin, *Theol. Mor.*, III, n. 608; Prümmer, *Theol. Mor.*, n. 825; *HPR*, XXVII (1926-1927), 195; Woywod, *A Practical Commentary*, I, n. 1011; *HPR*, XXIII (1923), 1059; Leitner, *Lehrb. des kath. Ehrechts*, p. 243. Vlaming (*Prael. Iuris Matr.*, n. 218, p. 190, not. 2), Harrington (*AER*, LXV [1921], 259-260), and Linneborn (*Grundriss des Ehrechts*, p. 203, not. 1) may also be regarded as favoring this opinion though they are not as explicit as the other authors. O'Keeffe (*Matrimonial Dispensations*, p. 85, note 105) refers also to Simon [*Faculties of Pastors and Confessors for Absolution and Dispensation*, p. 86] as holding this opinion.

⁴⁹ Chelodi, *Ius Matr.*, n. 41; Wernz-Vidal, *Ius Canonicum*, V, n. 413, Scholion, a.

⁵⁰ Motry, *Diocesan Faculties*, p. 133-134.

that such evidence can scarcely be used as a norm of interpretation for it is only with the advent of the nineteenth century that the full discipline of the Church regarding mixed marriages among the common people became in any manner universally established.⁴⁰ The earlier instructions sent to the Vicars Apostolic of missionary regions are likewise an unsafe guide for apparently they deal with a discipline not entirely fixed as to the observance of definite formalities.⁴¹

319. With due allowance for a period of transition that may have extended into the early part of the nineteenth century, it may be said without hesitation that the decisions and instructions of the Holy See in the nineteenth and twentieth centuries demonstrate beyond the shadow of a doubt that the *cautiones* became a *conditio sine qua non* of the very validity of dispensations for mixed and disparate marriages.⁴² There is the constant insistence that dispensations for mixed marriages cannot be given without the *cautiones*. The well known instruction of November 15, 1858, sent to the Bishops and Archbishops of the entire world, uses such expressions as: "*Insuper in tribuendis huiusmodi dispensationibus, praeter enunciatas cautiones quae praemitti semper debent, et super quibus dispensari nullo modo umquam potest*", and further on,—"*salvis firmisque semper ac per diligentem servatis cautionibus*."⁴³ Again, the formality of an oath could be dispensed with since the only *essential condition* was the promise of the customary *cautiones*.⁴⁴ In regions where the giving of the *cautiones* was proscribed by the civil law, the Holy Office continued to insist that on no condition could a dispensation for mixed marriages be given without them.⁴⁵ On no condition was an exception to this rule to be countenanced.⁴⁶

⁴⁰ See Nos. 104-106.

⁴¹ See No. 77; No. 345, note 115.

⁴² See No. 314, notes 31-32.

⁴³ *Coll.*, n. 1169.

⁴⁴ "Che per farsi luogo alla dispensa nei matrimonii misti, è essenziale solamente la promessa della solite cauzioni . . ." S. C. S. Off., litt. (S. Germani), 17 Feb. 1875.—*Fontes*, n. 1039.

⁴⁵ "... eas nullimode concedant nisi prius a partibus et praesertim a parte heterodoxa consuetae cautiones exhibitae fuerint."—S. C. S. Off., litt. (ad Card. Simor), 21 Jul. 1880,—*NRT*, XIX (1887), 8. Cf. Card. Rampolla, litt. (ad Card. Simor), 26 Sept. 1890,—*NRT*, XXIII (1891), 388-391.

⁴⁶ "I. An ab impedimento mixtae religionis dispensari possit, si pars

320. True, for strictly mixed marriages, there appears to be no decision which states the necessity of the *cautiones* for the *validity* of a dispensation in so many words, yet it is stated equivalently by placing the necessity of the *cautiones* on an equal basis with the necessity of just and grave causes,"—a fact which further exemplifies their relation to the validity of mixed marriage dispensations. Even canon 1061, § 1 of the Code does not state explicitly, i. e., in so many words, that they are required for the *validity* of dispensations, yet it does make it an implicit requirement in precisely the same way as did the decisions, namely, by placing the *cautiones* on an equal basis with just and grave causes as a *conditio sine qua non* of dispensation.

321. In the case of invalidly contracted mixed marriages (if in such circumstances the Catholic is well disposed) the Church has, indeed, shown a disposition to mitigate the full rigor of her discipline,—even though the non-Catholic refuses to give the *cautiones*. But rather than depart from her insistence that dispensations be granted only upon the giving of the *cautiones*, she has turned as a last resort to the dispensation given through the *sanatio in radice*. Even the faculty to grant a *sanatio in radice* for mixed marriages invalid because of clandestinity did not include the faculty to grant a *sanatio in radice* if the non-Catholic party refused to give the *cautiones*. The Holy Office decided that on no account was such a contingency to be provided for by a dispensation and the renewal of consent before a pastor assisting passively."

acatholica (quaecumque est) cautiones requisitas per litteras reversales, sive per iuramentum, sive per promissionem saltem omnimode recuset. R. Ad I. Negative, et detur Instructio 15 Novembris 1858."—S. C. S. Off., 10 Dec. 1902.—*Fontes*, n. 1262.

" See No. 314, note 32.

" "Ordinarius dioecesis N., obtenta enim facultate sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis quia non celebrata ad normam decreti *Ne Temere*, quando pars acatholica renuit se sistere coram parochio catholico, quaerit nunc: 1) Utrum quando pars acatholica non renuit se sistere coram parochio catholico, renuit tamen omnino praestare debitas cautiones, providendum sit per dispensationem ad renovationem consensus coram parochio catholico passive se habente, vel potius per sanationem in radice: et quatenus providendum sit per sanationem in radice. 2) Utrum facultas sanandi in radice in hoc secundo casu comprehensa censenda sit necne in facultate iam obtenta sanandi in radice matrimonia mixta, nulla ex capite clandestinitatis, vel. 3) Utrum peti debeat an non nova facultas a S. Sede.

322. In the law before the Code a dispensation from the impediment of Disparity of Cult could never be given without the *cautiones*.⁵⁰ In fact, disparate marriages contracted without the *cautiones* could be declared null and void by the Ordinary and without referring such cases to the Holy See.

1. Utrum dispensatio super impedimento disparitatis cultus ab habente a Sancta Sede potestatem, non requisitis vel denegatis praescriptis cautionibus impertita, valida habenda sit an non? Et quatenus negative:

2. Utrum hisce in casibus, cum scilicet de dispensatione sic invalide concessa evidenter constat, matrimonii ex hoc capite nullitatem per se ipse Ordinarius declarare valeat, vel opus sit, singulis vicibus, ad Sanctam Sedem pro sententia definitiva recurrere?

R. Ad 1. Dispensationem prout exponitur impertitam esse nullam.

Ad 2. Affirmative ad primam; negative ad secundam partem.⁵¹

The answer to the first *dubium* is given "*prout exponitur*". The proponents of the more liberal opinion regarding the validity of a dispensation granted in danger of death without the *cautiones*, urge that since the decision refers only to ordinary cases and to a delegated faculty, it cannot, therefore, serve as an interpretation of the clause "*praestitis consuetis cautionibus*" of canon 1043.

323. It is well to note that the question proposed in the first *dubium* mentions no circumstance whatever in connection with the use of the faculty. There is no suggestion that it refers

R. Ad 1. Negative ad primam partem, affirmative ad secundam.

Ad 2. Non comprehendi.

Ad 3. Provisum in secundo. Et supplicandum SSmo ut sanare dignetur in radice matrimonia ex hoc capite nulla quae usque adhuc ab Episcopis sanata fuerint.—S. C. S. Off., 22 Dec. 1916,—AAS, IX (1917), 13-14. Cf. S. C. S. Off., 21 Jun. 1912,—AAS, IV (1912), 443-444.

⁵⁰ The following decision was given on April 16, 1890, but was published in 1912: "An in concedendis ab habente a Sancta Sede potestatem dispensationibus super impedimento disparitatis cultus praescriptae cautiones semper sint exigendae", Emi ac Rmi DD. Cardinales in rebus fidei et morum Inquisitores generales, re perdiligenti examine discussa, respondendum decreverunt: 'Dispensationem super impedimento disparitatis cultus nunquam concedi, nisi expressis omnibus conditionibus seu cautionibus'.—S. C. S. Off., 21 Jun. 1912,—AAS, IV (1912), 442.

⁵¹ S. C. S. Off., 21 Jun. 1912,—AAS, IV (1912), 443.

only to "ordinary cases" and not to a danger of death. There is no reason to suppose that the faculty was limited to "ordinary cases", nor is there any reason why a Bishop may not or cannot use his delegated faculty in cases of danger of death even though he has the same faculty by common law in such cases. The question proposed merely asks whether a dispensation granted without the *cautiones* by any one who has the power to dispense from the Holy See, is valid or not. To say that only "ordinary" or "normal" cases are considered is to read into the *dubium* and the answer something that is neither explicitly nor implicitly stated.

324. But, it is urged, the danger of death is not mentioned, and the answer concerns a delegated faculty. Now since it is a probable opinion even among authors, who espouse the liberal view regarding the question at hand, that the faculties of February 20, 1888⁸⁰ can be understood as pertaining to ordinary jurisdiction,⁸¹ the decision of the Holy Office of March 18, 1891, will be of special interest since it refers both to the faculty of 1888 and consequently to the danger of death.

Relate ad facultates Episcopis a Sanctitate sua concessa (quae etiam parochis subdelegari possunt) dispensandi in articulo mortis in impedimentis matrimonium dirimentibus, rogo (ego Archiepiscopus) quoad impedimenta mixtae religionis et disparitatis cultus benignissimam declarationem, an in istis etiam in articulo mortis non aliter dispensari possit nisi 1) ambo contrahentes promittant educationem omnis prolis in religione catholica; et quidem 2) non solum prolis forte adhuc suscipiendae, sed etiam antea (in concubinato vel civili matrimonio) iam susceptae, in quantum scilicet hoc a parentibus adhuc dependet; atque nisi etiam 3) pars catholica (licet privatim tantum) promittat quod, in quantum poterit, conversionem partis non catholicae procurare sataget.

R. Cautiones etiam in articulo mortis esse exigendas; disparitatem cultus utpote impedimentum dirimens in Encyclica Sancti Officii 20 Februarii 1888 comprehendi: mixtum vero religionem, uti impedimentum impediens, non comprehendi.⁸²

⁸⁰ See No. 103, note 49.

⁸¹ De Becker, *De Spons. et Matr.*, p. 316; O'Keeffe, *Matrimonial Dispensations*, p. 99. Vide etiam Gasparri, *De Matr.*, n. 435. Wernz (*Ius Decret.*, IV, n. 617, not. 63), however, regarded the power as delegated.

⁸² S. C. S. Off. (Leopolien.), 18 Mart. 1891,—*Fontes*, n. 1132.

325. Though the *dubia* and the answer do not state in so many words the question as to the necessity of the *cautiones* for the validity of the dispensation, yet the question "*an in istis etiam in articulo mortis non aliter dispensari possit etc.*", and the answer,—"cautiones etiam in articulo mortis esse exigendas", must be interpreted in the light of the host of decisions that had already demanded the *cautiones* as a *conditio sine qua non* of the validity of dispensations. Everything in the answer, i. e., its wording and its contextual relation to the *dubium*, shows that the fixed discipline must be adhered to for validity even in danger of death, or as the present decision has it,—"in articulo mortis". Those who favor the liberal opinion say that the clause "*cautiones . . . esse exigendas*" does not express formally a condition of validity. Yet such an interpretation scarcely takes into consideration the relation of this decision to the many already existing,—it seems rather to manifest an attempt to defend an *a priori* assumption.

326. In a decision of July 6, 1898 the question was again asked in relation to the danger of death. The first two *dubia* concern a Catholic *in articulo mortis* who had lost the use of his senses, and there is, therefore, no question of validating the marriage since consent cannot be renewed. But then is proposed the following *dubium*: "*Quid, si iste moribundus [catholicus] sit compos sui et adsint filii baptizati, quos lex civilis retinet uti legitimos?*" To this it was answered: "*Episcopus vel parochus in casu uti poterit facultate Ordinariis concessa sub die 20 Febr. 1888, renovato consensu et datis cautionibus.*"^m In the wording of this decision the use of the faculty does not, indeed, precede the renewal of consent, though manifestly the use of the faculty must precede the renewal of consent. What is significant is the fact that both the renewal of consent and the giving of the *cautiones* are equally required, a clear indication that the *cautiones* are necessary for the *validity* of the marriage.ⁿ

327. Once more the question was put by a Bishop concerning the Leonine faculty of 1888.

^m S. C. S. Off., 6 Jul. 1898, ad 3.—*Fontes*, n. 1200.

ⁿ The *dubium* considered the case of a dying Catholic married civilly to an infidel. The question of the force of the ablative absolute will be discussed in No. 332.

Il Vescovo N. espone che nella sua diocesi insieme ai cattolici trovasi frammisto grande numero di eretici, il cui battesimo dà molto a dubitare della validità. Chiede perciò, per coloro che trovansi in articolo di morte ed in concubinato con tali eretici . . . la facoltà (delegabile anche ai parroci) di dispensare dagl'impedimenti di religione mista o di disparità di culto se esistono, quando amendue i contraenti, o almeno la parte cattolica promette di allevare la prole nella religione cattolica o almeno la nascita, quando la nata oltrepassi i sette anni.

To this question the reply was given that though the faculty of 1888 did include the impediment of Disparity of Cult it did not include that of Mixd Religion and continues:

Quoad dispensationem super impedimento mixtae religionis, pro casibus in quibus *omnes dentur cautiones*, et Episcopus moraliter certus sit easdem impletum iri, supplicandum SSmo pro facultate dispensandi ad triennium. Pro casibus vero in quibus vel prae habito actu mere civili, vel contractu coram ministro haeretico, vel utroque simul, *non omnes praestantur cautiones*, vel Episcopus moraliter certus non sit easdem impletum iri, supplicandum pariter SSmo *pro facultate sanandi in radice* matrimonia itidem ad triennium . . .²⁸

The answer is equivalent to this, that any dispensation from the impediment of Mixed Religion without all of the *cautiones* would be invalid unless given through a *sanatio in radice* by one possessing this delegated faculty. The immediate implication exists likewise that the same ruling would apply to dispensations from the impediment of Disparity of Cult granted by virtue of the faculty of 1888. The requirements for dispensation were the same for both impediments.²⁹

328. In the light of the decisions of March 18, 1891, of July 6, 1898, of April 12, 1899, and of the decisions preceding and following these, how must the decision of June 21, 1912 be interpreted? Whatever doubt may have existed in the minds of the Bishops proposing questions, or of authors who upheld a more liberal opinion, the decision of 1912 appears to solve them. Dispensations from either of these impediments without the *cautiones* are to be regarded as invalid. The clause "*prout exponitur*" contemplates no exception of *circumstances* regarding the refusal of the *cautiones*, but it does limit the decision to

²⁸ S. C. S. Off., 12 Apr. 1899,—*Fontes*, n. 1219.

²⁹ See No. 355, note 148.

one point, and the only one proposed in the first *dubium*, namely, with reference to their refusal. It does not pass on other questions such as a lack of moral certitude regarding the fulfillment of the *cautiones*, a requirement likewise demanded for the validity of a dispensation, but of its nature difficult to determine *post factum*. The answer to the second *dubium* confirms the interpretation that the clause "*prout exponitur*" has the function of limiting the competency of the Ordinary to those cases representing a refusal of the *cautiones* in connection with dispensations. It was only upon this issue, the refusal of the *cautiones*, that the Ordinary could give a declaration of the nullity of a disparate marriage contracted without the *cautiones*. There is no *circumstance* of the refusal of the *cautiones* mentioned in the *dubia*; neither is there any implied in the answer. The assertion, therefore, that the clause "*prout exponitur*" leaves room for cases of danger of death, is quite gratuitous. Nor is the objection that the *dubia* or the answers do not mention the danger of death, or that they regard a delegated faculty, one that can be sustained. That objection was answered in the decisions of March 18, 1891; July 6, 1898; and of April 12, 1899.

329. Some have expressed a regret that as a general rule the authors who wrote before the Code did not single out the circumstance of a danger of death to comment upon, yet call attention to the fact that those few who did deal with the question "*ex professo*" decided in favor of the more benign interpretation.⁶⁷ Is not this very dearth of evidence from the authors an indication that the circumstance of a danger of death was not regarded as an exception, and that it was unnecessary to treat of it "*ex professo*"? True, De Becker, De Smet, and De Smedt did favor the more benign interpretation,⁶⁸ yet it is of some significance that both De Becker and De Smet expressed this opinion before the decision of June 21, 1912. Apparently, De Becker has not since written upon this subject. De Smet has departed from his former opinion and now subscribes to the stricter interpretation.⁶⁹ De Smedt⁷⁰ urges the recourse to *epikeia* only for

⁶⁷ Cf. O'Keeffe, *Matrimonial Dispensations*, p. 88-89.

⁶⁸ See No. 315, note 34.

⁶⁹ See No. 317, note 46.

⁷⁰ LQS, LXVII (1914), 384-385.

mixed marriages, yet in his total disregard of the decision of June 21, 1912, he may not have had this decision in mind when he wrote. It is not one that may be dismissed with silence, and the best proof of this is that the authors favoring the benign opinion, who have written since the Code, deem it necessary to minimize its force by introducing limitations and distinctions which betray their realization of a real weakness in their position.

330. There is, therefore, little or no support for the more benign interpretation in the decisions and among the authors who wrote before the Code. The sudden favor that the opinion received after the Code leads one to suspect that perhaps there has been an attempt "to stretch a text". Certainly the law demanding the *cautiones* for the validity of dispensations has in no way changed. Canon 1061, § 1 clearly states that the Church will not dispense unless there be just and grave causes, and unless the *cautiones* are given. Beyond the fact that the *cautiones* and the causes are demanded as a *sine qua non* condition of dispensation, there is no further indication that the *cautiones* are demanded for the *validity* of ANY dispensation for mixed and disparate marriages. Yet that indication is certainly sufficient that they are demanded for the validity of such dispensations, and no canonist will maintain that canon 1061, § 1, n. 2, has reference only to the liceity of such dispensations.⁷¹

331. If the clause "*datis consuetis cautionibus*" of canon 1043 is to receive an interpretation from any canon in the Code, surely it is canon 1061, § 1, which treats formally of the necessity of the *cautiones*.⁷² And if canon 1061, § 1, demands the *cautiones* under pain of invalidity, is there any reason to suppose that the clause "*datis consuetis cautionibus*" of canon 1043 refers, either *per se* or *per accidens*, only to the liceity of a dispensation given in danger of death? If the entire last clause of canon 1043 referring to dispensations from the impediments of Mixed Religion and Disparity of Cult had been omitted, as it was in

⁷¹ King (*The Administration of the Sacraments to Dying Non-Catholics*, p. 129) does seem to entertain a doubt, but his argument is accepted by no other canonist.

⁷² It is not amiss to note that canons 1043 and canon 1061 are in the same book of the Code (Book III) and under the same title (Title VII).

the faculty of 1888, canon 1061, § 1, and the decisions would, nevertheless, demand the *cautiones* for the validity of such dispensations. The very insertion of the clause is significant. Its obvious meaning is that there is to be no exception as to the necessity of the *cautiones* even in cases of danger of death. And this necessity is expressed as a requirement for validity in canon 1061, § 1.

332. But it is said that the clause is put in the ablative absolute, and since there is a disagreement among the authors as to the force of such a grammatical construction, it is not certain that it binds under pain of invalidity. While a condition of validity is more often expressed by such particles as "si" or "dummodo", canon 39 explicitly leaves room for expressions of equivalent significance. The ablative absolute is not a usual way of expressing such a condition yet Pope Benedict XIV could write on this point: ". . . certissimum est inter Iurisperitos, quod vera conditio ex ABLATIVO ABSOLUTO consequitur: qua de re prætermitti nullo modo potest, licet gravissima incommoda iam exposita interponantur."⁷⁸ In this connection the decision of July 6, 1898⁷⁹ expressed the necessity of the *cautiones* in a like manner: "*renovato consensu et datis cautionibus*." Both requirements—the renewal of consent and the giving of the *cautiones*, were expressed by an ablative absolute construction for the validity of the marriage.

333. Again it is urged that the strict opinion exemplifies too great a rigor, that the Church in such circumstances would not wish to urge a discipline merely of her own creation. "In extremis pereat lex." But *de facto* the Church does explicitly demand the *cautiones* for precisely such circumstances ("*si dispensatio concedatur super cultus disparitate aut mixta religione, præstitis consuetis cautionibus*").⁸⁰ and for the very validity of the dispensation. There is, indeed, a certain appeal in the arguments that elaborate upon the hardships that might often result from the enforcement of the law of the Church in danger of death, but they lose their value in the presence of a positive law

⁷⁸ *Institutiones Ecclesiasticæ*, Inst. LXXXVII, n. LXVIII.—*Op. Omnia* (18 vols., Prati, 1839-1847), X, 386.

⁷⁹ See No. 326.

⁸⁰ Canon 1043.

that takes cognizance of the very circumstances postulated by the defenders of the liberal opinion. The popular axiom "*in extremis pereat lex*" has its obvious limitations. Will it not likewise be a hardship to the Catholic if the non-Catholic refuses to renew consent to validate a union invalid only because of the law of the Church? And is not this renewal merely an ecclesiastical requirement if only an ecclesiastical impediment is in question?" Then why, upon the argument from the axiom "*in extremis pereat lex*", may not a *sanatio in radice* be granted,—the Church has in the past, and also in her faculties that she now grants to Bishops of many dioceses, manifested her disposition to grant a *sanatio in radice* as a last resort if the *cautiones* are refused? It is well to note, however, that this resort to a *sanatio in radice* is *de facto* the only exception to her discipline on the necessity of the *cautiones*, yet canonists are agreed that a *sanatio in radice* cannot be granted by virtue of canon 1043.⁷⁶

334. True, the prohibitions of the divine law may cease in a particular case without the giving of the *cautiones*, but the very concern that a dispensation be not invalid because of the violation of the divine law is based solely on the positive law of the Church that has demanded this as a condition of the validity of dispensation. The divine law itself contains no such invalidating clause. Had Mixed Religion and Disparity of Cult never become canonical impediments, there would be no question either as to the validity or invalidity of dispensation but only a question as to the lawfulness of such marriages in particular instances.⁷⁷ Will any canonist say that the positive law of the Church, demanding under pain of invalidity that dispensations be not granted in violation of the divine law, may be submitted to the axiom "*in extremis pereat lex*"? But in addition to demanding this as a condition of validity by positive law; by the

⁷⁶ Cf. canon 1133, § 2.

⁷⁷ Cf. canon 1141; O'Keeffe, *Matrimonial Dispensations*, p. 92-93; Wernz, *Ius Decret.*, IV, n. 616, not. 67 (who refers to the faculty of 1888); Cappello, *De Sacram.*, III, n. 232, 1; De Smet, *De Spons. et Matr.*, n. 761; Ayrinhac, *Marriage Legislation*, p. 323; Motry, *Diocesan Faculties*, p. 134.

⁷⁸ For example, there is no question of the invalidity of the Ordinary's permission in canon 1065, § 2, but only of the *lawfulness* of his permission. Canons 1065 and 1066 regard a prohibition, not a canonical impediment.

same positive law the Church demands for validity the necessity of the *cautiones*, and even in danger of death,—“*praestitis consuetis cautionibus*”. Her law remains in force, and as a condition of validity, regardless of this circumstance. Nor can an appeal to *epikeia* be sustained, for among canonists it is generally admitted that *epikeia* cannot be used where there is question of the *validity* of an act.” Exception is, indeed, admitted for common necessity^m but the present question is not concerned with that kind of necessity. The lawgiver has, moreover, provided for the necessity of a danger of death, and hence the resort to *epikeia* is futile.

335. If it were true that the clause “*datis consuetis cautionibus*” referred only to the liceity of the dispensation, then this interpretation should apply also to canon 1045.ⁿ Since, as the proponents of the liberal opinion maintain, the decision of June 21, 1912^m does not include the cases of a danger of death but only ordinary [?] cases, it might likewise be said that it does not include other cases of urgent necessity. Cerato,ⁿ and Pighiⁿ do accept the logical consequences of the liberal opinionⁿ and extend it to canon 1045. O’Keeffe,ⁿ Kelly,ⁿ Cappello,ⁿ and Vermeerschⁿ protest against this extension and deny all probability to such an interpretation. They argue that the just cause, posited

^m Cf. Schmalzgrueber, *Jus Eccl. Univ.*, Tom. I, P. I, Tit. II, n. 49; Pichler, *Jus Can.*, Lib. 1, Tit. II, n. 76; Zitelli, *De Dispens. Matr.*, p. 9; Maroto, *Institutiones*, I, n. 243.

ⁿ Cf. Maroto, *loc. cit.*; Cocchi, *Comment.*, Vol. 1, n. 80; Vlaming, *Prael. Iuris Matr.*, n. 198. De Smet (*De Spons. et Matr.*, nn. 469, 716; p. 614, not. 2) and Hilling (*Die allgemeinen Normen des C. I. C.*, p. 88) appear also to admit it for grave necessity in particular cases, but the legitimate use of this principle is, indeed, very doubtful.

ⁿ “*Possunt Ordinarii locorum, sub clausulis in fine can. 1043 statutis . . . etc.*”—Canon 1045, § 1.

ⁿ See No. 322.

ⁿ *Matr.*, n. 37.

ⁿ *De Matr.*, n. 90.

ⁿ The same conclusion seems also to be suggested by Vermeersch-Creusen, (*Epitome*, II, n. 331): “*E causa gravissima et urgente possit concedi dispensatio super cautione ab acatholica parte praestanda, si pars catholica periculum perversionis non incurrat etc.*”

ⁿ *Matrimonial Dispensations*, p. 144-145.

ⁿ *The Jurisdiction of the Simple Confessor*, p. 185-186.

ⁿ *De Sacram.*, III, n. 233.

ⁿ *Theol. Mor.*, III, n. 759.

especially by Cerato as existing in the urgent necessity itself, represents a confusion of the causes and the *cautiones*. Canon 1061, they say, clearly requires both causes and *cautiones*. Granting the existence of a cause, the *cautiones* are still required for the validity of a dispensation. But may not the extremities of circumstances be urged both as a cause for dispensation from the impediment and as a cause for dispensation from the *cautiones*? Canon 1061, § 1, canon 1043, the decisions, and the authors upholding the stricter opinion are arrayed against it, and it may be regarded as enjoying no sound probability. But in rejecting it, it is well to note that the entire position of the liberal opinion becomes more and more precarious.

336. Furthermore, among the authors favoring the benign interpretation of the clause "*praestitis consuetis cautionibus*" of canon 1043, there is no unanimity as to what circumstance is really necessary to grant a valid dispensation without the *cautiones*. Then what precisely may be said to be the so-called solidly probable opinion among the authors regarding the validity of dispensations without the *cautiones*? Is it that such dispensations will be valid if granted not only in danger of death but also in other urgent necessity? There are four of the liberal authors who deny all probability to this opinion.⁸⁰ Nor is the danger of death accepted without reservation by the liberal authors, for O'Keeffe demands that *the non-Catholic party* be in extreme danger of death before the dispensation can be given validly.⁸¹ Kelly demands that the non-Catholic party be not only in danger of death "but in actual *articulo mortis*, death being inevitable and proximate."⁸² King concludes his discussion: "If there are no offspring it is hard to see how there could be a just and sufficient cause to exercise the faculty with the denial of the *cautiones* as the *urgente mortis periculo* removes danger of concubinage, etc., for the present."⁸³ Genicot-Salsmans

⁸⁰ See No. 335.

⁸¹ *Matrimonial Dispensations*, p. 89-92. O'Keeffe refers to the decision of July 6, 1898, (see No. 326) to support his distinction. But see the decision of April 16, 1890, (No. 322, note 58) which makes no such distinction. Moreover, neither these two nor any other decisions support the liberal opinion.

⁸² *The Jurisdiction of the Simple Confessor*, p. 94.

⁸³ *The Administration of the Sacraments to Dying Non-Catholics*, p. 131.

draws a distinction between a non-attempted marriage and one already attempted. In the first hypothesis the absolute necessity of the *cautiones* is upheld; in the second a *dubium iuris* is admitted with a recommendation that such cases be referred to the Holy See.* Much has been made of the fact that Vermeersch has changed his position from the strict to the liberal view. In answer, attention has already been called to the fact that De Smet has changed to the strict opinion.* Even Vermeersch denies the validity of an argument from canon 1043 and deduces it rather from canon 81.* But the recourse to canon 81 is of doubtful value, for again it may be repeated with emphasis that the Holy See grants a dispensation from the impediments of Mixed Religion and Disparity of Cult without the *cautiones* only through the *sanatio in radice*. It is not a probable opinion that the Ordinary can grant a *sanatio in radice* by virtue of canon 81. Moreover, canon 81 will be of little assistance to the pastor, priest, or confessor mentioned in canons 1044 and 1045.

337. Granted that some phase or other of the benign interpretation is accepted by many authors, what limitation or extension of it can be regarded as solidly probable? Is canon 209 to be invoked for its widest extension as it is proposed by Pighi and Cerato? Other and more limited phases are likewise subject to the very criticisms of the liberal authors themselves. Which of these is to be regarded as solidly probable, and upon what norm of discrimination? If neither the decisions nor the canons lend intrinsic support to any one of the limitations or extensions of the benign interpretation, what is the value of a recourse to authors disagreeing among themselves? And even if a sufficient number of authors can be marshalled to the support of one phase of the liberal opinion, it is to be remembered that an argument from mere external authority has little weight in the face of a positive law of the Church to the contrary. At one time a

* *Theol. Mor.*, II, nn. 493, 514.

* See No. 315, note 34; No. 317, note 46.

* "Si plene obtinere vel prudenter [cautiones] peti posse non videntur. Ordinarius probabilius valide agit qui, in his rebus extremis, condicionibus iure divino requisitis contentus sit. Id tamen minus ex praesenti facultate, quam ex can. 81 colligimus quo, ubi mora inducit periculum gravis damni. Ordinarius ad mentem S. Sedis dispensare permittitur."— *Theol. Mor.*, n. 759.

host of canonists and theologians of name subscribed to the opinion that a custom had developed in the northern countries of Europe which had abrogated the necessity of dispensation from the impediment of Mixed Religion.⁹⁷ Even their great number did not make the opinion solidly probable. It was contrary to the mind of the Church and it was, therefore, rejected by the Church.⁹⁸ It may, therefore, be said that the opinion which would uphold the validity of a dispensation from the impediments of Mixed Religion and Disparity of Cult, given without the *cautiones* in any other way but through a *sanatio in radice*, is not solidly probable. The *sanatio in radice* can be granted only by those who have the delegated faculty from the Holy See.

338. Nor does there appear to be sufficient justification for a recourse to passive assistance for strictly *mixed* marriages when a dispensation in danger of death ("*ad consulendum conscientiae et, si casus ferat, legitimationi prolis*") cannot be validly given without the *cautiones*.⁹⁹ Passive assistance in the emergency postulated seems indeed to be valid for its abrogation,¹⁰⁰ with reference to its *validity*, can be understood as referring to those cases where the observance of the form is strictly required for the validity of a marriage. Canon 1043, on the other hand, confers upon the Ordinary the power to dispense from the form, which appears to include the power (in as far as validity is concerned) to dispense from the asking of the consent as it is prescribed in canon 1102, § 1. There seems to be no evident reason why canon 1102, § 1, should represent an exception from the general power of dispensing from the form conferred by canon 1043.

339. Though a recourse to passive assistance for mixed marriages would not be a violation of the clause of canon 1043,

⁹⁷ See No. 81, note 13.

⁹⁸ See No. 104, note 54.

⁹⁹ Whatever justification may be attributed to a recourse to passive assistance for mixed marriages in such an emergency, needless to say, it will be of no avail for *disparate* marriages since their validity will depend on the validity of the dispensation from the impediment of Disparity of Cult. The dispensation from this impediment without the *cautiones* can be granted only through the *sanatio in radice*.

¹⁰⁰ See Nos. 385-386.

("si dispensatio concedatur super cultus disparitate aut mixta religione, praestitis consuetis cautionibus"), since no dispensation from the impediment is given, it is, nevertheless, a violation of the law of the Church. The Catholic who would dare to contract a mixed marriage without dispensation incurs the penalty of canon 2375. The Church, moreover, has time and again forbidden priests to assist at mixed marriages for which no dispensation had been given. The former tolerance of passive assistance was restricted to very definite regions¹⁰¹ and it is not to be readily supposed that even with the power to dispense from the form granted by canon 1043, the Church would be willing to tolerate a passive assistance at mixed marriages contracted without dispensation in danger of death, when she has explicitly withdrawn her former tolerance from the very regions where it was permitted.¹⁰² Perhaps a certain *epikeia* might be permitted in extreme cases since the question of the validity of an act does not seem to arise.¹⁰³ The suggestion of the possibility of such a recourse is given with the greatest hesitation. The lawfulness of such a procedure is in gravest doubt. The legislator demands the *cautiones* even in danger of death,—"*praestitis consuetis cautionibus*". It is, therefore, difficult to see how a legitimate use could be made of the principle of *epikeia*.

ART. VI. NATURE AND CONTENT OF THE *Cautiones*

340. In every mixed or disparate marriage there is a certain amount of danger to the faith of the Catholic party and of the children,—a danger that constitutes one of the very elements of the Church's prohibition to such marriages. It is only when this danger of the violation of the divine and natural law has been rendered remote, that the Church will consider the matter of a dispensation.¹⁰⁴ To this end, namely, that the proximate danger¹⁰⁵ may be regarded as absent, she demands

¹⁰¹ See No. 106, notes 57-58.

¹⁰² Cf. Maroto, "De Matrimonii Mixti Illicitis", *Apollinaris*, I (1928), 342.

¹⁰³ Cf. Petrovits, *New Church Law on Matrimony*, n. 269.

¹⁰⁴ The requirement of a just and grave cause is not under consideration for the present, though it is a *conditio sine qua non* of dispensation.

¹⁰⁵ "Dico 'quibus saltem periculum proximum perversionis removeatur'. Ordinario enim nisi pars haeretica ad fidem catholicam transeat, aliqua peri-

certain guarantees. These guarantees are under the form of explicit promises or *cautiones*. The non-Catholic party must promise to remove the danger of perversion from the Catholic party; both parties must promise that the children will be baptized only in the Catholic Church and that their religious education will be exclusively in the Catholic Faith. In addition there is required a moral certainty of the fulfillment of these promises, and normally these promises must be exacted in writing.¹⁰⁰

CANON 1061

§ 1. *Ecclesia super impedimento mixtae religionis non dispensat, nisi:*

2° *Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo, et uterque coniux de universa prole catholice tantum baptizanda et educanda;*

3° *Moralis habeatur certitudo de cautionum implemento.*

§ 2. *Cautiones regulariter in scriptis exigantur.*¹⁰¹

§ I. "*Cautionem praestiterit coniux acatholicus de amovendo a coniuge catholico perversionis periculo*"

341. The non-Catholic's promise is a personal obligation to remove all danger of perversion of which he or she would in any way be a source by word or action. It is a promise to remove every obstacle which through his or her agency would hinder the free exercise of the religious obligations and practices that should be the normal part of Catholic life. The obligation is stated in the form of a general principle involving a

cula, plus minusve remota parti catholicae et liberis suscipiendis remanebunt. At, quia huiusmodi pericula nondum sunt formaliter peccata, fieri potest, ut propter causam proportionate gravem prohibitio legis naturalis aut cesset aut iam non sit gravis."—Vlaming, *Prael. Iuris Matr.*, I, p. 186, not. 1. Cf. De Smet, *De Spons. et Matr.*, n. 503.

¹⁰⁰ Since the *cautiones* are a very condition of dispensation, it need scarcely be repeated that they must precede not only the mixed or disparate marriage, but the dispensation itself. Cf. Cappello, *De Sacram.*, III, n. 311; Blat, *Comment.*, Vol. III, P. I, n. 456; Koudelka, *Pastors*, p. 137. In the law of the Church the *cautiones* are not demanded, however, as a condition of matrimonial consent, but rather of dispensation. If the *cautiones* are exacted as a condition of consent, this is a condition placed by the Catholic party, not by the Church. Cf. *Apollinaris*, I (1928), 120; *Sacra Romana Rota*, 11 Aug. 1921.—AAS, XIV (1922), 512-523.

¹⁰¹ Canon 1071 establishes the same norm for the impediment of Disparity of Cult.

host of particular details, only a few of which will be mentioned by way of example. It implies the removal of every obstacle to the observance of all the obligations of the marital state which the parties wish to enter; a removal of any inducement to immoral practices which in a certain sense would be equivalent to a contumely of the Creator. Every hindrance must be removed from the Catholic's fulfillment of such duties as the attendance at Holy Mass, especially on Sundays and Holy Days of obligation; the reception of the Sacraments; the observance of the laws of fast and abstinence; the Catholic's reasonable support of the Church. Many of the Catholic's obligations will often, either directly or indirectly, affect the non-Catholic, yet the promise to remove every danger of perversion must be given before the Church will dispense.

§ II. "*Et uterque coniux de universa prole catholice tantum baptizanda et educanda*"

342. Ever since the *cautiones* have become fixed in the Church's discipline for the mixed marriages of the common people, the non-Catholic party has always been required to give the *cautio* for the Catholic education of the children. The letter of the Holy Office sent to Cardinal Simor on July 21, 1880, expressed the concern that the *cautio* for the children be given especially by the non-Catholic.¹⁰⁸ The *cautio* of the Catholic party as to the Catholic Baptism and education of the children is a new element of the *cautiones* introduced by the Code. Formerly this promise does not appear to have been demanded expressly,¹⁰⁹—perhaps on the assumption that this

¹⁰⁸ "Ut partes, et praesertim haeretica, veras cautiones praestiterint, quibus se coram Ecclesia obligent ad ea, quae ab iisdem eadem Ecclesia exigit: inter quae praeceptum locum tenet catholica educatio universae omnino prolis absque exceptione sive restrictione."—NRT, XIX (1887), 7.

¹⁰⁹ Cf. Petrovits, *New Church Law on Matrimony*, n. 191. The concern as to the Catholic education of the children was emphasized as an obligation which was to be imposed on the Catholic (cf. Rescript. Poenitentiariae, 19 Jan. 1836.—Roskovány, *De Matr. Mixtis*, III, p. 156, not. *) rather than as a formal *cautio* to be given by the Catholic party. This was especially true in cases where the marriage had already been contracted. Cf. S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Jan. 1871, n. 7.—*Fontes*, n. 1013; 9 Oct. 1877.—NRT, XV (1883), 578; 12 Apr. 1899.—*Fontes*, n. 1219. The same practice seems to be suggested in the present faculty given to the American Bishops for the granting of the *sanatio in radice* where the non-Catholic refuses the *cautiones*. See infra. No. 263; Vermeersch-Creusen, *Epi-*

would be the Catholic's intention. On the other hand the former *cautio* required by the Catholic party that he extend every effort ("*pro viribus suis*") toward procuring the conversion of the non-Catholic party¹¹⁰ does not appear in the Code as a formal *cautio* but is placed in canon 1062 as an obligation in charity upon the Catholic, to which he must prudently ("*prudenter*") direct his efforts.¹¹¹

A. "*Uterque coniux*"

343. Though the letter of the Holy Office sent to Cardinal Simor on July 21, 1880, emphasized the special necessity of the non-Catholic's *cautiones*,¹¹² the Code in canon 1061, § 1, n. 2, suggests no such preponderance of emphasis, but apparently demands the *cautio* of both parties with equal emphasis as a *conditio sine qua non* of dispensation. Would a dispensation given without the *cautio* of the Catholic party be invalid? It would seem to be invalid, though a case involving a question of this kind should be referred to the Holy Office. Canon 1061, § 1, n. 2, likewise demands that the *cautiones* be given by the parties themselves. It will not suffice that the parents, in their stead, give the *cautiones*.¹¹³

rome, II, n. 871. In one instance, however, it appears that both the Catholic and the non-Catholic party were to give the *cautiones* regarding the education of the children. Cf. S. C. S. Off., 12 Mart. 1881.—NRT, XV (1883), 121-122. In another instance a promise seems to have been exacted of the Catholic party, both with regard to the conversion of the non-Catholic and the Catholic education of the children. Cf. S. C. S. Off., 15 Mart. 1854.—LQS, XLVI (1893), 21-22.

¹¹⁰ Cf. Gregorius XVI, litt. ap. *Quas vestro*, 30 Apr. 1841, n. 2.—*Fontes*, n. 497; instr. (ad Archiep. et Ep. Austriacae ditionis), 22 Maii 1841.—Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 720; Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858.—*Coll.*, n. 1169. In one instance, however, where the marriage had already been contracted, this seems to have been exacted more as an obligation than as a formal *cautio*. The case concerned the exercise of the faculty of a *sanatio in radice*. Cf. S. C. S. Off., 12 Apr. 1899.—*Fontes*, n. 1219. See No. 366, note 172.

¹¹¹ Cf. Petrovits, *New Church Law on Matrimony*, n. 258; Linneborn, *Grundriss des Eherechts*, p. 165, not. 2; Woywod, *A Practical Commentary*, I, n. 1040.

¹¹² "... eas [dispensationes] nullimode concedant nisi prius a partibus et praesertim a parte heterodoxa consuetae cautiones exhibitae fuerint."—NRT, XIX (1887), 8.

¹¹³ This will have particular reference to such regions of the Orient where parents make all the marriage engagements for their children. Even in such cases the parties themselves will have to give the *cautions* unless the Ordinary who dispenses by a delegated faculty has also the faculty to dispense from

B. "De universa prole"

344. The requirement of canon 1061, § 1, n. 2, that all the children be included in the *cautiones* is not a new prescription but one that has always been insisted upon by the Church, —regardless of the leeway allowed by some authors for the *causa publica*.¹¹⁴ It does away with any such arrangement that by the custom of a community or the agreement of the parties would, for example, permit the boys to follow the religion of the father and the girls that of the mother, or all of the children to be educated in the religion of the father if he be a non-Catholic. There can be no doubt whatever that the *cautio* given by both parties for the Catholic Baptism and education of the children must include, for both the validity and liceity of the dispensation, every child that will be born of that union. A natural question arises, however, as to whether this promise looks only to the future or whether it regards also the past.

345. The question proposed in the decision of the Holy Office of March 18, 1891, as to whether (even *in articulo mortis*) a dispensation could be given only upon the promise of both parties that all the children, whether born already of

this prescription. Cf. Ione, "Die Kautelen bei dem Hinderniss der Religionsverschiedenheit", *LQS*, LXXIX (1926), 810-814. The answer given by the Holy Office to the following *dubium* is of particular interest: "*Quando parentes catechumeni aut neophyti ante conversionem a paganismo suae filiae sponsalia fecerunt cum viro infideli, nec est possibile contractum rescindere, quid agendum cum puella quae baptismum postulat? Equidem ius habet ad baptismum, sed propter periculum fundatum perversionis, iuxta S. Ligorium, non expedit baptizare; at infidelis sponsi parentes cum iuramento affirmant quod relinquent puellam sacros religionis suae actus peragere: an baptizanda ante matrimonium? Denegamus baptismum, ut, peracto matrimonio, possimus iudicare an sit contumelia Creatoris; si non appareat periculum perversionis, sponsam baptizamus solum post matrimonium, ut si post tempus indeterminatum exurgit animae periculum, possit deserere infidelem, et alias legitimas nuptias appetere, et suae salutis providere. An iste modus agendi sit securior in praxi?*"

R. Modum, de quo in dubio, non improbari, nisi baptismi necessitas urgeat, aut nisi baptismus sit diutius differendus, et nisi etiam CAUTIONES DATAE FUERINT NON SOLUM A PARENTIBUS, SED ETIAM A FUTURO CO-NUIGE; quo in casu, praevia dispensatione, matrimonium permitti poterit." —S. C. S. Off. (Pekin.), 29 Apr. 1891, ad 2.—*Fontes*, n. 1134. For another case of the deferring of Baptism see S. C. S. Off., instr. (pro Vic. Ap. ad Gallas), 20 Jun. 1866, ad 10.—*Fontes*, n. 994. Dispensations are likewise not to be granted upon the request of parents for their children who are still *impuberes*. Cf. S. C. S. Off., 12 Jan. 1769, n. III.—*Fontes*, n. 822.

¹¹⁴ See No. 303, note 2; No. 305, note 5.

concubinage or a civil union, or to be born in the future, should be educated in the Catholic religion, was answered: "*Cautiones etiam in articulo mortis esse exigendas.*"¹¹⁸ Just what is implied in the answer regarding the children already born of the invalid union is not altogether clear. There is an indication, however, in the unqualified answer as to the necessity of the *cautiones*, that they should likewise regard the children already born of the invalid union.

346. In this connection, Vlaming proposes the question with regard to the children of the non-Catholic party by a former marriage and quotes from a decision given on March 20, 1899, by the Congregation of the Propaganda to the Bishop of Harlem: "*licet pro viribus sit curandum ut . . . in catholica religione instituantur, tamen haud absolute hoc exigendum pro concedenda dispensatione, nisi iidem filii ex altero matrimonio mixto sint orti, et parens priores conditiones non observavit.*"¹¹⁹ While it is stated that the obligation to care for the Catholic education of the children need not be exacted absolutely for the non-Catholic's children by a former marriage, it is implied, nevertheless, that the necessity is absolute if such children were born of a former mixed marriage in which the non-Catholic party had not observed the *cautiones*. The first part of the deci-

¹¹⁸ *Fontes*, n. 1132. On the third of May, 1828, the Vicar Apostolic of Tonkin asked whether a dispensation from the impediment of Disparity of Cult could be given in gravest necessity, such as in *periculo mortis*, if the infidel consort (invalidly married to a Catholic woman) consented to everything except the Catholic education of the first born, or the first male child already born, or to be born. The answer of the Congregation of the Propaganda was given in the affirmative with the proviso "*pro casu mortis*", and that the Catholic woman would promise, in the event of recovery, to exert every effort to procure the conversion of the infidel party, and the Catholic education of all the children. (Cf. *Coll.*, n. 804). Just what force this decision still retains, even for the region for which it was given, is very doubtful. Attention has already been directed to the fact of its date, and particularly the place to which it was sent. (See No. 318). The fact that extraordinary conditions have existed and continue to exist in the Orient must constantly be kept in mind. Yet even such unusual circumstances do not in modern times, with the fully established discipline regarding the necessity of the *cautiones*, necessarily permit the liberties apparently suggested in older decisions. The Holy Office deemed it necessary to provide anew, at least in part, for precisely such extraordinary circumstances by granting special faculties with reference to the *cautiones*. Cf. Winslow, *Vicars and Prefects Apostolic*, p. 106-107. This decision can, therefore, scarcely serve as a guide for other regions, and especially for an interpretation of canon 1061, § 1, n. 2.

¹¹⁹ *Prael. Iuris Matr.*, n. 218.

sion seems to speak more in the terms of an obligation than of a strict *cautio* yet, since it refers to a manner of procedure in granting a dispensation, it must refer to the *cautiones* since at that time they were a *conditio sine qua non* of dispensation. Though the decision does not use the term "*cautiones*" when referring to the non-Catholic's observance of former conditions, it does imply that an obligation had been placed on the non-Catholic, and again it must refer to the *cautiones*. The entire context of the decision, therefore, demands the conclusion that there is question of the *cautiones*.

347. De Smet considers the case of a valid mixed marriage contracted without the *cautiones* and permits the reception of the sacraments by a well disposed Catholic giving the *cautiones* although the non-Catholic is unwilling to give them.¹¹⁷ By way of confirmation, he quotes from a reply of the Holy Office of June 2, 1910, sent to the Bishop of Bruges, who presented the case of a well-disposed Catholic wife whose husband refused to promise the Catholic education of a child already born. The reply was: "*oratrix acquiescat, curet tamen pro viribus prolis etiam iam natae catholicam educationem.*"¹¹⁸

348. Apparently, few authors have committed themselves on this question. Konings-Putzer demands that the *cautiones* regard also the children already born, whether from illicit intercourse (apparently referring to that of the parties wishing to contract a mixed or disparate marriage), or of a former marriage of the Catholic party.¹¹⁹ Prümmer requires that they regard not only the children to be born but also those begotten illegitimately by the contracting parties before the marriage, though he does not appear to require the absolute necessity of formal *cautiones* for children born to the non-Catholic party of a former marriage.¹²⁰ An unnamed writer, discussing the question in the

¹¹⁷ *De Spons. et Matr.*, n. 514, d. Vide etiam S. C. S. Off., 2 Mart. 1842. —Gasparri, *De Matr.*, n. 523; (Georgiae), 5 Aug. 1846.—*Coll.*, n. 1009. By reason of canon 1098 such valid mixed marriages are still possible.

¹¹⁸ *Op. cit.*, p. 451, not. 1.

¹¹⁹ *Comment. in Facult.*, p. 381.

¹²⁰ "Haec conditio valet pro omni prole non solum ex isto matrimonio nascitura, sed etiam ab ipsis contrahentibus ante matrimonium illegitime genita. Praeterea cum parochus tum pars catholica prudenter curare debeat, ut proles forte ex altero sponso in praecedenti connubio nata ab haeresi abducatur et catholice educetur. Nam quando alter sponsus prolem ex alio connubio

Ecclesiastical Review,¹²¹ seems to favor the opinion requiring the *cautiones* for children already born of the parties, yet concludes: "At the present time it seems an open question. A pronouncement from the Holy See would be welcome, but since there has been no definite decision, a pastor would seem to be free to exact promises only with regard to future children, always presupposing that in the individual case there is moral certitude that the promises will be fulfilled."¹²² O'Neill,¹²³ likewise, is of the opinion that the *cautiones* should be exacted both for children already born of these parties as well as for those to be born in the future, though he does not state it with finality. "We should say that the circumstances of each individual case would require to be examined in order to determine whether the danger of perversion were still serious."¹²⁴

349. The well known instruction of 1858 uses the term "*universa proles*" in a sense that seems to designate only those children that are to be born of the marriage: "*ut universa utriusque sexus proles, ex mixtis hisce matrimoniis procreanda, in sanctitate catholicae religionis educari omnino deberet.*"¹²⁵ On the

progenitam in haeresi obstinate educare vult, saepe inducitur vehemens timor, ne ipsa in novo matrimonio non sit adimpleturus condiciones praescriptas. Quapropter tunc dispensatio valde caute petenda et executioni mandanda est."

—*Theol. Mor.*, III, n. 781.

¹²² LXXIV (1926), 630-632.

¹²³ *Ibid.* The reason given by the writer for including such children in the *cautiones* is that, if the non-Catholic party were insistent upon the heretical education of these children, the requirement of canon 1061, § 1, n. 3, could with difficulty be verified.

¹²⁴ *IER*, XXIII (1924), 417.

¹²⁵ *Ibid.*

¹²⁶ Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169. Pope Gregory XVI also uses the expression "*de prole universa*" but gives no further qualification to its meaning. Cf. ep. encycl. *Summo iugiter*, 27 Maii 1832, § 2.—*Fontes*, n. 484. In other instances, however, where the same Pontiff speaks of the *cautiones* for the children, he seems to refer to children to be born in the future. Cf. allocut. *Officii memores*, 5 Iul. 1839,—*Fontes*, n. 492; litt ap. *Quas vestro*, 30 Apr. 1841, n. 2,—*Fontes*, n. 497. Vide etiam Pius VI, rescript. ad Card. Archiep. Mechlinien., 13 Iul. 1782, n. 4,—*Fontes*, n. 471; Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830,—*Fontes*, n. 482. The term "*universa proles*" is found also in the following sources but without qualification: S. C. S. Off. (ad Ep. Osnabrugens.), 17 Feb. 1864,—*Fontes*, n. 976; instr. (ad Archiep. Corcyren.), 3 Ian. 1871, n. 3,—*Fontes*, n. 1013; litt. (ad Card. Simor), 21 Iul. 1880,—*NRT*, XIX (1887), 7-8. In the letter of Cardinal Rampolla of September 26, 1890, to Cardinal Simor (*NRT*, XXIII [1891], 388-391) the term is modified by such expressions as: "*ex hisce coniugiis procreanda*" or "*ex iis nascitura*", yet from another passage of the same letter (see No. 351, note 133) it appears that the children already born are to be included.

other hand, a decision of the Holy Office of October 9, 1877, seems to interpret the term as referring also to those children already born, and even of a former marriage.¹²⁶ Again, while the answer of the Holy Office in the decision of March 18, 1891,¹²⁷ ("*Cautiones etiam in articulo mortis esse exigendas*") does not necessarily give a clear decision upon the question as to the inclusion of children already born to the parties in an invalid union, the opinion favoring their inclusion does no violence either to the wording or context of the decision,—in fact it appears to be more in conformity with it. The Code in canon 1061, § 1, n. 2,¹²⁸ does not qualify the phrase. The question regarding the inclusion of children other than those to be born in the future of the proposed mixed or disparate marriages is open, however, to a score of hypotheses, and there is necessarily a distinct hesitation in committing oneself to definite opinions. They are ventured only upon a meager source of evidence available for interpretation.

350. From the earliest times, however, the Church has shown her solicitude regarding the Catholic Baptism and education of children already born of mixed and disparate marriages.¹²⁹ It may be well also to direct attention to the fact that what in the law before the Code was generally demanded as an *obligation* on the part of the Catholic with regard to the Catholic education of the children is now, for the most part, demanded as a formal *cautio* in canon 1061, § 1, n. 2.¹³⁰ In modern legislation there are apparently only two recognized excep-

¹²⁶ "Cum ex supplici libello constet Oratricem viduam superstitem ex priori connubio habere prolem, pro qua sub dominio viri heterodoxi magnum imminet perversionis periculum, mens est eiusdem Sanctitatis Suae urgere pastorem sollicitudinem tuam, ut adhibita parochi opera, mulierem moneas ut sedulo invigilet super catholica educatione *prolis universae tam natae* quae ad matrem pertinet, quam in posterum nasciturae."—*NRT*, XV (1883), 578. Though the decision does not apparently deal with a dispensation and seems to suppose the second marriage to be valid, the interpretation of the term "*proles universa*" is one that should be noted. Vide etiam S. C. S. Off., 2 Mart. 1842,—Gasparrì, *De Matr.*, n. 523 (quoted infra in No. 351, note 133).

¹²⁷ See infra No. 345.

¹²⁸ See also canon 1065, § 2.

¹²⁹ Cf. Conc. Chalcedonense (451), canon 14,—Mansi, VII, 388; Conc. Toletanum IV (633), canon 63,—Mansi, X, 634.

¹³⁰ See No. 342.

tions to the strict demand of formal *cautiones* for children already born to the parties as joint parents. One concerns the case of a valid mixed marriage already contracted without the *cautiones*; the other, the prescriptions governing the exercise of the faculty to grant a *sanatio in radice* where the non-Catholic party in an invalid mixed or disparate marriage refuses to give the *cautiones*,—prescriptions which seem to imply more of an obligation to be imposed on the Catholic party disposed to assume it, than the absolute necessity of giving a formal *cautio*. The first exception does not deal with a dispensation from the impediment; the second deals with an extraordinary dispensation. Again, the decision of March 20, 1899,¹²¹ implies that the *cautiones* are of absolute necessity for the non-Catholic's children born of a former mixed (or disparate) marriage where the present non-Catholic party had not observed the *cautiones*. With this in mind, the following opinions are ventured *salvo meliori iudicio*.

351. Those children born of the non-Catholic party in a former mixed or disparate marriage,¹²² where this party did not observe the *cautiones*, who are to be under the care of the parties in the proposed mixed or disparate marriage, are to be included in the phrase "*de universa prole*" of canon 1061, § 1, n. 2. If they were born of a strictly non-Catholic marriage (i. e., between two non-Catholics) they should normally be included in the *cautiones*, at least for the liceity of the dispensation. If both of the parties to a proposed mixed or disparate marriage are the joint parents of children already born to them outside of a valid marriage and these are to be under their care after the proposed mixed or disparate marriage, they must, it seems, give the *cautiones* for these children also, and this for the validity of the dispensation.¹²³ It would, moreover, be very diffi-

¹²¹ See No. 346.

¹²² The opinion would scarcely need to be modified in the event that the present non-Catholic party had been the Catholic party in a former mixed or disparate marriage. If he had been a Catholic in a former Catholic marriage, the same ruling seems to apply.

¹²³ "Quoad matrimonia valida, ad sacramenta percipienda posse admitti sine praevia renovatione consensus; sed ab iisdem percipiendis arcendos donec vera dederint resipiscentia signa, et promiserint executores totis viribus tam conversionem partis haereticae quam educationem in religione catholica prolis universae natae et forsitan nasciturae, . . . Quoad matrimonia vero invalida,

cult in practice to arrive at the moral certainty of the fulfillment of the *cautiones* for the children to be born in the future if they are obstinately refused for those already born.

352. Those children already born, especially those who have not yet been baptized and educated as Catholics, who have the Catholic party for their parent and who are to be under the care of the parties proposing to contract a mixed or disparate marriage, should be included in the *cautiones*, and, perhaps, for the validity of the dispensation.¹²⁴ This opinion may, at first sight, seem to express a certain rigor, yet it seems to be in keeping with the mind of the Church, who could scarcely be considered as willing to grant a dispensation to a Catholic presump-

cum sit nullum eorum matrimonium vitio clandestinitatis, non esse admit-tendos ad receptionem sacramentorum, nisi prius promiserint post impetratam dispensationem super impedimento mixtae religionis se fideliter executores eas omnes condiciones, quae exiguntur in praefata dispensatione . . .”—S. C. S. Off., 2 Mart. 1842.—Gasparri, *De Matr.*, n. 523. While this decision does not say explicitly that the conditions of the dispensation will demand that the *cautiones* regard also the children already born, there is no implication that the demands of the first part of the decree for a mixed marriage validly contracted will in any way be mitigated for one invalidly contracted. In a letter sent by Cardinal Rampolla to Cardinal Simor on September 26, 1890, there is this direction: "*Quare cum agnitum esset in quadam regione necessitatem imponi, ut proles ex mixtis coniugiis NATA omnino educetur in religione schismatica, Sancta Sedes dispensationes denegavit.*"—NRT, XXIII (1891), 389. Cf. S. C. S. Off., 12 Mart. 1881.—NRT, XV (1883), 121-122. At present, the faculty to grant a *sanatio in radice* seems to offer the only exception to this rule of exacting formal *cautiones* for children already born or to be born.

¹²⁴ If the present Catholic party is a convert and formerly was the non-Catholic party to a mixed or disparate marriage, the same ruling appears to hold regarding the *cautio* for the children of this former marriage. The non-observance of the *cautiones* in the former marriage seems to require this by the decision of March 20, 1899, (see No. 346). The supposition is that up to the present they have not been brought up as Catholics. If the former marriage had been contracted without the *cautiones*, the *cautiones* should be exacted at least for the liceity, if not for the validity of the dispensation for the proposed marriage. What if the present Catholic party was formerly the non-Catholic party to a strictly non-Catholic marriage (i. e., between two non-Catholics)? Those baptized children who were infants at the time of the parent's conversion may, perhaps, be regarded as converts through the interpretative intention of their convert parent (see No. 182), but this is by no means certain. But what if these children who have reached the age of reason (and those who were at the age of reason at the time of the parent's conversion) have not been educated in the Catholic Faith (supposing their valid non-Catholic Baptism).—must they be included in the *cautiones* for the validity of a dispensation? Perhaps they should, though this is not certain. For the liceity of the dispensation, however, they should normally be included if they are to be under the care of the parties to the proposed mixed or disparate marriage.

tively under excommunication and a suspicion of heresy¹²⁶ for the very violation of the divine law regarding the Catholic education of the children, which the Church strives to her utmost to protect in the *cautiones*. Moreover, at least an implicit agreement forbidden under pain of excommunication in canon 2319, § 1, n. 2, would seem to be implied in the case under consideration. Normally, the *cautio* seems to be required (at least for the liceity of the dispensation) for those children of the Catholic party who have been baptized and educated in the Catholic Church. Ordinarily there is as much danger of their perversion from the non-Catholic foster parent as there is for the children to be born of the marriage, and it is the general presumption of danger that the Church considers. The Code, however, demands the *cautio* not only from the non-Catholic party, but from both parties. That such a *cautio* for the children already raised as Catholics is not clearly demanded for the validity of the dispensation may, perhaps, be deduced by analogy from the decision of the Congregation of the Propaganda of March 20, 1899.¹²⁷

C. "*Catholice tantum baptizanda et educanda*"

353. The *cautiones* as to the exclusively Catholic Baptism and education of the children precludes any double program of Baptism or religious education. Any double ceremony of Baptism is forbidden whereby, for example, the children would first be baptized in the Catholic Church and then also presented for a non-Catholic Baptism. Nor may the children be educated successively in both the Catholic Faith and in non-Catholic belief. Any limitation as to the age up to which the children are to be educated as Catholics, in the sense that thereafter they will receive a non-Catholic religious education, is likewise prohibited. True, there appear to be instances in which the Holy See seemed to tolerate a limitation of age within which the children were to be under the exclusive training of the Catholic parent, as it was exemplified in the Spanish and French treaties of marriage with James and Charles of England.¹²⁷ Yet it is certainly doubt-

¹²⁶ Cf. canon 2319, § 1, n. 4; § 2.

¹²⁸ See No. 346.

¹²⁷ See No. 90, note 27; No. 92. Cappello (*De Sacram.*, III, n. 315)

ful whether the Church, in any particular cases of mixed or disparate marriages among the common people, could in any sense be considered tolerant of any limitation of age as to their exclusively Catholic education.¹³⁸ While the age of fourteen for children of both sexes may, perhaps, be accepted as an age when children are presumed to possess a sufficient responsibility of their own to incur censures,¹³⁹ yet the parents would be forbidden to become the agent of their receiving a non-Catholic education.¹⁴⁰ They may not be able to exercise a compelling force to have their children enjoying the use of reason baptized in the Catholic Church,¹⁴¹ or to have them educated in the Catholic Faith after they have reached the age of twenty-one,¹⁴² but they are positively forbidden to become the agents of their non-Catholic religious education.

354. The obligations in the *cautiones* assumed by the parties to a mixed or disparate marriage imply that they will have the children baptized as soon as possible in the Catholic Church;¹⁴³ that they will have their children approach the sacraments of Penance and the Eucharist when they have reached the required age;¹⁴⁴ that they will cooperate with the pastor in having the children confirmed;¹⁴⁵ that they will have their children instructed in the Catholic Faith.¹⁴⁶ Normally, this latter ob-

says that many authors (he does not refer to any) seriously doubt whether the Holy See really admitted a condition of this kind, since the Catholic education of the children up to the age of thirteen does not seem to remove sufficiently the danger of perversion.

¹³⁸ Cf. Gasparri, *De Matr.*, n. 498.

¹³⁹ See No. 176, note 65.

¹⁴⁰ The civil law of a certain region spurned any arrangement made for a mixed marriage regarding the religious status of the children and demanded that the children be educated in the father's religion. No option was given to the children below the age of 14 years. Mixed marriages, in which the father was the non-Catholic, gave rise, therefore, to distressing situations and accordingly the following *dubium* was proposed (cf. Feije, *De Imped. et Dispens.*, p. 446, not. 3): "*Quidnam Episcopis et parochis faciendum, si forte pars catholica ante annum 14 aetatis liberorum moriatur, et proinde promissis suis stare non potuit? R. Episcopis et parochis huiusmodi filios remanere commendatos, qui satagere debent pro viribus, ut catholica doctrina imbuantur.*"—S. C. S. Off., 30 Jun. 1842, ad 3.—*Fontes*, n. 890.

¹⁴¹ Cf. canon 752, § 1.

¹⁴² Cf. canon 89.

¹⁴³ Canon 770.

¹⁴⁴ Canons 860; 906.

¹⁴⁵ Canon 787.

¹⁴⁶ Cf. canons 1113; 1335; 1372.

ligation will imply their education in a Catholic school, and only where attendance at a Catholic school is impossible through circumstances, can any other means of their education be tolerated.¹⁴⁷

§ III. "*Moralis habeatur certitudo de cautionum implemento*"

355. The giving of the *cautiones* is not sufficient for the validity of a dispensation, for in addition is required a moral certainty of their fulfillment,—a requirement quite as necessary for the validity of a dispensation from the impediments of Mixed Religion and Disparity of Cult as the very giving of the *cautiones* and the existence of just and grave causes.¹⁴⁸ Though the canon does not specify who is to have the moral certainty of the fulfillment of the *cautiones*, it is readily gathered from the wording of the faculties given to the Bishops of the United States,¹⁴⁹ and from the sources existing in the law before the Code, that it pertains to the Bishop, or, as it is worded in one instance: "*Ut superior ecclesiasticus moralem certitudinem habeat sive de cautionum sinceritate pro praesenti, sive de eorumdem adimplemento pro futuro.*"¹⁵⁰

¹⁴⁷ Cf. canons 1373-1374.

¹⁴⁸ This same requirement in the Law before the Code is particularly manifested in a decision of the Holy Office of April 12, 1899, (*Fontes*, n. 1219). The question apparently assumed that the Leonine faculty of 1888 extended to both the impediments of Disparity of Cult and Mixed Religion and therefore proposed a *dubium* regarding the *cautiones in articulo mortis*. The reply stated that the impediment of Disparity of Cult was, indeed, provided for in the faculty of 1888 and then continues: "*Quoad dispensationem super impedimento mixtae religionis, pro casibus in quibus omnes dentur cautiones, ET EPISCOPUS MORALITER CERTUS SIT EASDEM IMPLETUM IRI, supplicandum SSmo pro facultate dispensandi ad triennium. Pro casibus vero, in quibus vel praehabito actu mere civili, vel contractu coram ministro haeretico, vel utroque simul, non omnes praestentur cautiones, VEL EPISCOPUM MORALITER CERTUS NON SIT EASDEM IMPLETUM IRI, supplicandum pariter SSmo pro facultate sanandi in radice matrimonia itidem ad triennium . . .*" The implication of the reply is that the same moral certainty of the fulfillment of the *cautiones* would be required for a dispensation from the impediment of Disparity of Cult to be granted by virtue of the Leonine faculty of 1888. Vide etiam S. C. S. Off. (Helvetiae), 21 Jan. 1863, n. 4,—*Fontes*, n. 973; litt. (S. Germani), 17 Feb. 1875,—*Fontes*, n. 1039; (ad Ep. Aurelianen.), 6 Jun. 1879,—*Fontes*, n. 1064; litt. (ad Card. Simor), 21 Jul. 1880,—*NRT*, XIX (1887), 7; 10 Dec. 1902,—*Fontes*, n. 1262; S. C. de Prop. F., litt. (ad Ep. Ottawien.), 17 Apr. 1879,—*Coll.*, n. 1517; Litt. Secret. Stat. (ad Archiep. Strigonien.), 7 Jul. 1890,—*NRT*, XXIII (1891), 387-388.

¹⁴⁹ See No. 249.

¹⁵⁰ S. C. S. Off., litt. (ad Card. Simor), 21 Jul. 1880,—*NRT*, XIX (1887), 7. See the references to the decrees in note 148.

356. What is really the implication of canon 1061, § 1, n. 3, when it demands: "*Moralis habeatur certitudo de cautionum implemento*"? Several authors require the good faith of the parties giving the *cautiones*, so that if they were given fraudulently, i. e., with the intention to deceive, and this deception could be proved to have existed at the time the dispensation was granted, the dispensation would have to be regarded as invalid.¹⁸¹ The argument for this position may be summarized as follows. Only those promises can be regarded as real promises which are given sincerely and in good faith. A distinction must be made between the good faith of the parties giving the *cautiones*, and the moral certitude on the part of the ecclesiastical superior demanding the promises. The objective truth of the sincerity of the promises is of prime importance. Bad faith would vitiate the promises even if the Bishop had moral certitude. If the Church demanded no more than the mere fact of the promises she would be putting a premium on dishonesty. It would be tantamount to encouraging fraud in order to procure a dispensation. The Church would not jeopardize the spiritual welfare of her children by sanctioning and legalizing bad faith in the *cautiones*.

357. De Smet, on the other hand, goes to quite the opposite extreme when he writes: "*Nimirum coniuges debent, pro parte ipsos spectante, promittere cautelarum iniunctarum observationem, et quidem serio et fidenter. Pro valore tamen dispensationis sufficit quod cautiones exigantur ac praestentur, licet datae fuerint fictae.*"¹⁸² O'Donnell is of the opinion that the matter of insincerity would affect the validity of a dispensation only in so far as its presence or absence would be manifested to the Ordinary upon which he [the Ordinary] could judge of the moral certainty of their fulfillment. His argument turns particularly upon the requisite character of the *cautiones*, namely, that they be "*verae*" and "*opportunae*". The term "*verae*" he understands as referring to *cautiones* that are not based on vague, casual, or ambiguous statements, nor on the supposed character

¹⁸¹ Woywod, *A Practical Commentary*, I, n. 1056; Harrington, "The Importance of the Cautiones in Disparity of Worship", *AER*, LXV (1921), 261-262; Petrovits, *New Church Law on Matrimony*, n. 257.

¹⁸² *De Spons. et Matr.*, n. 505. Vide etiam *op. cit.*, nn. 590, 874, et p. 731, not. 3. In this last reference, De Smet refers to S. Romana Rota, 26 Nov. 1921,—*AAS*, XIV (1922), 515 s. in confirmation of his opinion.

of the parties, nor in fact on anything that gives rise to conjecture rather than moral certainty. For the term "*opportunae*" he turns to the definition given in the decision of the Holy Office of July 30, 1842 (ad 5).¹⁵³

358. De Smet's opinion, that for the validity of a dispensation it suffices that the *cautiones* are demanded and given, scarcely seems to take sufficient cognizance of the distinction which the Code clearly makes between the giving of the *cautiones* and the moral certainty of their fulfillment. O'Donnell's opinion is more acceptable though it seems to give too great a proportion of emphasis on the formalities of the *cautiones* to the neglect of other elements. At the same time, the authors who urge that an absence of good faith in the parties giving the *cautiones* renders the dispensation invalid, seem to demand an element for validity not required by the Church. Canon 1061, § 1, n. 2, simply requires that the *cautiones* be given; there is no suggestion that an objective good faith must exist for the validity of the dispensation. The solution of the question seems, therefore, to turn largely upon the interpretation given to canon 1061, § 1, n. 3, and, perhaps, also upon the significance of canon 1061, § 2.

359. True, the Ordinary must have moral certainty "*sive de cautionum sinceritate pro praesenti, sive de eorumdem adimplimento pro futuro*",¹⁵⁴ yet the very means the Ordinary must employ to determine this, imply that the validity of a dispensation depends rather on the judgment of the Ordinary upon the facts revealed to him, than upon a correspondence of these manifestations with the objective truth of an intention actually existing. Underlying the Ordinary's judgment that a moral certainty exists as to the sincerity of the *cautiones* for the present, or as to their fulfillment in the future, is, indeed, a supposition that *hic et nunc* the parties are actually acting in good faith and

¹⁵³ *Fontes*, n. 890. O'Donnell's article appeared in *IER*, XVIII (1921), 411-418.

¹⁵⁴ Canon 1061, § 1, n. 3 does not explicitly contain the requirement of a moral certainty as to the sincerity at the time they are given, yet, since the law in this regard appears to be the same as it was in the law before the Code, there seems to be no significance in the silence of the canon. By virtue of canon 6, nn. 2, 4, this requirement is to be regarded as still remaining in force.

that the *cautiones* will really be fulfilled, but it is not a supposition that must be verified also in the internal or occult forum, or in the contingencies of the future for the validity of a dispensation.

360. In determining the presence or absence of this moral certainty, the Ordinary depends, in most cases, upon the judgment of the pastor presenting the petition or upon the facts submitted therein for his own judgment. In this connection the authors,¹⁸⁶ supported by decisions of the Holy See,¹⁸⁸ agree that many elements must be considered, of which a fair indication is given in the following passage from Vlaming:

Ad huiusmodi certitudinem moralem tum sibi, tum praesertim superiori dispensaturo comparandam, parochus debet cuiuslibet casus concreti adiuncta ponderare et videre, cuiusnam indolis sit uterque promittens (e. g. utrum pars acatholica eiusmodi sit, ut merito sperari possit, fore ut promissa teneat; utrum pars catholica sit satis constans et sufficienter de officiis suae religionis instructa) et cuiusnam conditionis (e. g. utrum pars acatholica libere possit de se suisque prolibus disponere, an vero dependeat ab aliis, et a quibusnam; nam saepe evenit, ut serio promittens a sua familia protestanti zelosa, quominus promissa adimpleat, persuadeatur; utrum forte alterutra pars semel mixto matrimonio iuncta fuerit, et quomodo in tali matrimonio susceptae prolis educatio processerit, etc.). Quodsi parochus omnibus ponderatis, serium aliquod dubium maneat sive "de cautionum sinceritate pro praesenti, sive de earum implemento pro futuro", non omittat tum dubium ipsum, tum rationes dubitandi in dispensationis petitione exponere.¹⁸⁷

The entire process points rather to the issue of the Ordinary's judgment upon the facts revealed to him or to the pastor, than

¹⁸⁶ Konings-Putzer, *Comment. in Facult.*, p. 385-386; Cerato, *Matr.*, n. 55; Chelodi, *Ius Matr.*, n. 60; Blat, *Comment.*, Vol. III, P. I, n. 456; Vermeersch-Creusen, *Epitome*, II, n. 331; Vlaming, *Prael. Iuris Matr.*, n. 219.

¹⁸⁶ Cf. S. C. S. Off., litt. (S. Germani), 17 Feb. 1875,—*Fontes*, n. 1039; 10 Dec. 1902,—*Fontes*, n. 1262.

¹⁸⁷ *Loc. cit.* In this connection it will be well for pastors to keep in mind the warning of the Second Plenary Council of Baltimore (n. 335): "Moneantur tamen animarum pastores, ut in hisce promissionibus exigendis fortiter quidem in re, in modo tamen suaviter se gerant, ne 'aemulationem quidem Dei habentes, sed non secundum scientiam', utrumque sponsum exasperant, indeque mala oriantur graviora; quod eo magis praecavendum, cum constet raro hisce in regionibus ab Episcopo vel sacerdote pro ineundis eiusmodi nuptiis dispensationem peti, donec res iam eo usque processerit, ut Matrimonium per Ecclesiae monita abrumpi posse vix sit sperandum."

upon the objective correspondence of the intention of one or both parties. The fundamental question concerning the validity of the dispensation is not whether fictitious promises are real promises or not, but whether the character of the parties, the circumstances of the case, and the very character of the promises given,¹⁰⁰ justifies the judgment as to the sincerity and fulfillment of the *cautiones*.

361. This opinion receives ample confirmation from an examination of the history of the *cautiones*, especially with regard to their attendant formalities. Attention has already been directed to the fact that the *cautiones*, as they are known today, in all probability trace their origin to a *Stylus Curiae* that for at least a century and a half dealt almost exclusively with the formalities of religious-political treaties accompanying the mixed marriages of the Catholic nobility.¹⁰⁰ As far as the Church was concerned, such formalities served but one purpose, namely, to give the Church a sufficient assurance that the stipulations and guarantees were definite and sincere, and that they would be fulfilled. The well known treaties involved in what is known in English History as the Spanish and French match, by which Charles was engaged to marry a Catholic princess, exemplifies well this purpose. The writing of the guarantees, the oaths and witnesses demanded with the signatures, served as a sufficient evidence for the Church to judge of the definiteness and sincerity of the *cautiones*,—especially when the oath of a king and a prince was given. The promise exacted of Louis XIII that he bind himself and his successors to employ the power of France to see to it that the stipulations and guarantees were fulfilled, had the effect of giving the Church moral certainty of their fulfillment. There is no suggestion in the entire history of the procedure¹⁰⁰ that if the promises of James and Charles were given in bad faith, as in all probability they were, or that if the surety pledged by Louis XIII was insincere, that the dispensation would be invalid. The Church looked to the content of the stip-

¹⁰⁰ The character of the promises themselves is usually provided for by printed forms of the "*cautiones*" issued by diocesan Chanceries.

¹⁰⁰ See Nos. 95, 101.

¹⁰⁰ The same may be said of the many other instances of mixed marriages among the Catholic nobility. See No. 95, note 30.

ulations and to the manifestations of sincerity and surety rather than to the occult intentions that may have prompted them. The formalities served as a guide upon which the Church could judge of the justification of a dispensation, rather than as a condition which implied that the objective intention of the parties had to correspond in every detail for the objective validity of the dispensation.

362. Now while some of the formalities of state treaties necessarily disappeared in the application of the *Stylus Curiae* to the mixed marriages of the common people, many were retained, especially in the beginning. Their very retention marks their origin and also their identity of purpose, and indicates that the Church still employs them for the very reason that she is bent rather upon a judgment acquired through external manifestations than upon an absolute verification of the correspondence of these manifestations with the truth of a real intention. The Church continued to demand a "*cautio opportuna*" which she herself defined as: "*Talem promissionem, quae in pactum deducta praebeat morale fundamentum de veritate executionis, ita ut prudenter eiusmodi executio expectari possit.*"¹⁸¹ With reference to the formality of an oath, the Holy Office decided on February 17, 1875, that it could be omitted since it was only an ecclesiastical requirement, provided *circumstances* permitted the omission.

Chè per farsi luogo alla dispensa nei matrimonii misti, è essenziale solamente la promessa delle solite cauzioni, la quale dev'essere così seria, che il Vescovo riesca a formarsi la certezza morale che sarà dal coniuge eterodosso osservata ed adempiuta fedelmente; e dove egli o per le qualità del soggetto, o per altre circostanze non potesse acquistare simile certezza, può a buon diritto domandare che la promessa sia munita di giuramento.¹⁸²

The very point of emphasis is not upon the objective intention but upon the means to be employed by the Bishop to attain moral certainty of their fulfillment.¹⁸³ This same emphasis is

¹⁸¹ S. C. S. Off., 30 Jun. 1842, ad 5,—*Fontes*, n. 890.

¹⁸² S. C. S. Off., litt. (S. Germani), 17 Feb. 1875,—*Fontes*, n. 1039.

¹⁸³ The decision of April 17, 1879 (*Coll.*, n. 1517) directing that Bishops on no pretext grant a dispensation if they were not convinced that the

again manifested in an answer to an inquiry whether the assertion of the Catholic party under oath could be accepted to the effect that the non-Catholic party had given the *cautiones*.

Per se et generatim negative, et ad mentem. Mens est: Quod in aliquo casu extraordinario talia concurrant adiuncta, ut Episcopus valeat sibi comparare moralem certitudinem tam de huiusmodi cautionum sinceritate pro praesenti, quam de earum adimplemento pro futuro, specialesque omnino adsint rationes impediennes ne consueto modo cautiones praestantur, ipsius conscientiae et prudentiae. Caeteroquin non obstante decreto regio, opportuna exhibentur in scriptis cautiones, sicut hucusque factum est, neque detur dispensatio nisi Episcopus moraliter certus sit eas impletum iri.¹⁴⁴

363. The very prescription of canon 1061, § 2, that the *cautiones* be normally given in writing, serves a much larger purpose than suggested by Petrovits when he states that their written form impresses more deeply on the contracting parties the importance of the obligations embraced, and serves as a proof in the external forum of their voluntary assumption.¹⁴⁵ True, this purpose is served, but the whole history of the *cautiones* shows that the formalities of oaths, witnesses, or writing, is to serve more immediately as evidence upon which the Ordinary can form his ultimate judgment.¹⁴⁶ It is not the only evidence to be considered, however, since all the circumstances which manifest themselves must be taken into account. But the decisions and instructions of the Holy See, and the history of

written *cautiones* were sincerely given elicits the following remarks from O'Donnell: "... the implication is strong that if they were convinced [of their sincerity] even though the document was fraudulent, they were empowered to grant a real dispensation, and in the ordinary course would grant it as a matter of fact."—*IER*, XVIII (1921), 414.

¹⁴⁴ S. C. S. Off., 10 Dec. 1902, ad 2,—*Fontes*, n. 1262. The *votum* in the *causa Parisiensis* (S. Romana Rota, 11 Aug. 1921,—*AAS*, XIV [1922], 516) offers further confirmation. Though the question deals primarily with the *cautiones* as a condition of matrimonial consent, the absolute character of the following sentence is to be noted. "*Quare, etiamsi pars acatholica FICTE promittat, peccat utique, sed quia consensus alterius partis his promissionibus non subiicitur tamquam conditioni sine qua non, MATRIMONIUM VALIDUM NIHILOMINUS CENSENDUM ERIT.*"

¹⁴⁵ *New Church Law on Matrimony*, nn. 192, 247.

¹⁴⁶ Cf. Sabetti-Barrett, *Theol. Mor.*, n. 872; Cappello, *De Sacram.*, III, n. 310; Vlaming, *Prael. Iuris Matr.*, n. 220; Blat, *Comment.*, Vol. III, P. I, n. 456.

the *cautiones* do seem to show that the validity of a dispensation depends rather upon the evidence which governed the judgment of the Ordinary than upon the objective good faith of the parties. Even if it were proved later on that, *de facto*, the promises were given fictitiously, it appears that the validity of the dispensation must depend rather upon the validity of the Ordinary's judgment of the evidence presented to him. If the evidence manifestly did not warrant a moral certainty of the sincerity of the promises and their fulfillment, the dispensation will probably have to be regarded as invalid.¹⁰⁷ Certainly no dispensation should be declared null on the ground that one or both parties were in bad faith without referring the case to the Holy Office.

364. The opinion that a dispensation is not vitiated by the bad faith of the parties in giving the *cautiones*, as long as it was not manifested to the Ordinary, does not put a premium on vice any more than a recognition of the gravity of causes for dispensation which have their ultimate source in a grave sin of the parties. It does not sanction fraud any more than canon 1054, which upholds the validity of a dispensation from a minor impediment even though the causes alleged for dispensation were fraudulent. If the prescriptions of the Church with regard to the determination of the sincerity of the promises and their fulfillment are carefully observed, the number of dispensations granted on the bad faith of the parties will be reduced to a minimum. The exceptions are accidents that will not injure the law, nor render it ineffective.

§ IV. "*Cautiones regulariter in scriptis exigantur*"

365. This prescription of canon 1061, § 2, that the *cautiones* be normally given in writing does not make the demand absolute for the very reason that in extraordinary circumstances (e. g. in danger of death) the Bishop may employ a less formal method of exacting the *cautiones*. The very word "*regulariter*"

¹⁰⁷ Too much stress must not be laid upon the fact that the parties manifested their fictitious intention to others. The oath taken by James and Charles before Parliament (see No. 93) was certainly a manifestation of bad faith, yet the validity of the dispensation given by Pope Urban VIII has never been challenged.

implies that the written form is not necessary for the validity of the dispensation. Even in the law before the Code it was the accepted opinion of the authors that the written form was not necessary for validity.¹⁶⁸ The written *cautiones* are to accompany the petition for dispensation and are to be kept on file in the Episcopal Curia.¹⁶⁹

ART. VII. ADDITIONAL OBLIGATION OF THE CATHOLIC PARTY

366. The Catholic's obligation to strive prudently for the conversion of the non-Catholic party¹⁷⁰ is a divine and natural obligation of charity. Its prudent fulfillment in no way implies inopportune invitations and persuasions,—much less the promotion of arguments and altercations over religious questions. The fulfillment of the obligation will be rather through prayer, good example, and a *prudent* direction of conversation at opportune times.¹⁷¹ The promise of the observance of this obligation is no longer required as a *conditio sine qua non* of dispensation.¹⁷²

ART. VIII. OBLIGATION OF ORDINARIES AND PASTORS

CANON 1064, N. 3

Ordinarii alique animarum pastores:

Mixtis nuptiis celebratis sive in proprio sive in alieno territorio, sedulo invigilent ut coniuges promissiones factas fideliter impleant.

367. This obligation upon Ordinaries and pastors is not new with the Code, but existed likewise in the law before the

¹⁶⁸ Cf. Gasparri, *De Matr.*, n. 499; Wernz, *Ius Decret.*, IV, n. 510, not. 41; n. 587, not. 42.

¹⁶⁹ Cf. Cappello, *De Sacram.*, III, n. 310; Cerato, *Matr.*, n. 55, b.

¹⁷⁰ "Coniux catholicus obligatione tenetur conversionem coniugis acatholici prudenter curandi."—Canon 1062. See infra No. 342, notes 109-110.

¹⁷¹ Cf. Cerato, *Matr.*, n. 56; Vlaming, *Prael. Iuris Matr.*, n. 224; De Smet, *De Spons. et Matr.*, n. 507.

¹⁷² See No. 342. Even in the period immediately preceding the Code exceptions to the demand of this obligation in the form of a formal *cautio* became more frequent. Cf. De Smet, *op. cit.*, p. 444, not. 2; Vermeersch-Creusen, *Epitome*, II, n. 332.

Code.¹⁷⁸ It is an obligation upon the Ordinary and the pastor over those actually residing within their territory, regardless of whether these marriages were contracted there or not. Such mixed and disparate marriages will be discovered especially through a careful census of the parish, and thereupon the pastor must use every effort at his command to see to it that the promises which were given are fulfilled.¹⁷⁹ The exercise of a prudent zeal will in many cases promote their fulfillment. The neglect of this grave obligation may often explain the defections from the Faith through mixed and disparate marriages.

ART. IX. PROVISION FOR MARRIAGES FORBIDDEN IN CANON 1065

368. Canon 1065, § 2, demands that the Ordinary give his permission for the pastor's assistance at marriages of Catholics with those who have left the Faith or who have joined condemned societies only upon the following condition: ". . . *dummodo urgeat gravis causa et pro suo prudenti arbitrio Ordinarius iudicet satis cautum esse catholicae educationi universae prolis et remotioni periculi perversionis alterius coniugis.*" The wording of the canon and the accepted opinion among the authors is to the effect that the formal *cautiones* demanded for mixed and disparate marriages are not strictly required for these cases. The nature of the provision is left rather to the good judgment of the Ordinary.¹⁷⁸ Whenever the particular law of a diocese or of a province demands formal *cautiones*, this provision must be observed, and there is nothing in the canon which forbids such a requirement. It is rather to be recommended that the *cautiones* should be given.

¹⁷⁸ Cf. Gregorius XVI, allocut. *Officii memores*, 5 Jul. 1839.—*Fontes*, n. 492; S. C. S. Off., 21 Jan. 1863, n. 2.—*Fontes*, n. 973; 9 Oct. 1877.—*NRT*, XV (1883), 578; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 12.—*Fontes*, n. 1112; S. C. de Prop. F., instr. (ad Archiep. Balthimorem.), 25 Jun. 1884.—*Coll.*, n. 1621.

¹⁷⁹ Linneborn (*Grundriss des Eherechts*, p. 169) demands that if the parties move to another diocese or parish, their future pastor is to be informed.

¹⁷⁸ The necessity of the formal *cautiones* seems to be demanded by Vermeersch-Creusen (*Epitome*, II, n. 335) but clearly this is not strictly required by the Code. Cf. Quigley, *Condemned Societies*, p. 105; Wernz-Vidal, *Ius Canonicum*, V, n. 201; Ayrinhac, *Marriage Legislation*, p. 132; Cappello, *De Sacram.*, III, n. 331; Blat, *Comment.*, Vol. III, P. I, n. 460.

CHAPTER XIV

THE CELEBRATION OF MIXED AND DISPARATE MARRIAGES

CANON 1063

§ 1. *Etsi ab Ecclesia obtenta sit dispensatio super impedimento mixtae religionis, coniuges nequeunt, vel ante vel post matrimonium coram Ecclesia initum, adire quoque, sive per se sive per procuratorem, ministrum acatholicum uti sacris addictum, ad matrimonialem consensum praestandum vel renovandum.*

§ 2. *Si parochus certe noverit sponso hanc legem violaturos esse vel iam violasse, eorum matrimonio ne assistat, nisi ex gravissimis causis, remoto scandalo et consulto prius Ordinario.*

§ 3. *Non improbatur tamen quod, lege civili iubente, coniuges se sistant etiam coram ministro acatholico, officialis civilis tantum munere fungente, idque ad actum civilem dumtaxat explendum, effectum civilium gratia.*

ART. I. MARRIAGES ATTEMPTED BEFORE A NON-CATHOLIC MINISTER "*uti sacris addictus*"

369. Even though the parties to a mixed or disparate¹ marriage have received a dispensation to marry, they are strictly forbidden to give or to renew their matrimonial consent before a non-Catholic minister acting in his ministerial capacity ("*uti sacris addictus*").² It is a sacrilege for a Catholic thus to participate in non-Catholic rites and ceremonies,³ a *communicatio in sacris* forbidden by the divine law itself, since it involves at

¹ Cf. canon 1071.

² Cf. S. C. S. Off., 27 Aug. 1658,—*Fontes*, n. 731; (*Hiberniae*), 29 Nov. 1672,—*Fontes*, n. 751; (*Saxoniae*), 29 Jan. 1817,—*Fontes*, n. 852; 21 Apr. 1847.—*Roskovány. De Matr. Mixtis*, III, p. 331; litt. (ad Vic. Ap. Myssurién.), 26 Nov. 1862,—*Fontes*, n. 971.

³ "Illicitum porro ac sacrilegum est se sistere coram haeretico seu schismatico ministro ante vel post contractas mixtas nuptias, quoties ipse ut minister

least an implicit profession of heresy or schism.⁴ In as far as this prohibition is concerned, it matters little whether a dispensation either from the impediment of Mixed Religion or Disparity of Cult had been given or not; whether the parties give their consent first before a non-Catholic minister and then *coram Eccelsia Catholica*, or whether this process is reversed; whether they appear in person or by proxy.⁵ The prohibition is concerned with the Catholic's appearance before a non-Catholic minister who acts in his ministerial capacity to witness the Catholic's matrimonial consent. The giving or renewal of matrimonial consent before a non-Catholic minister acting in this capacity is forbidden even though the Catholic party would declare in writing that he would conduct himself merely in a passive manner, in no way wishing to adhere to a non-Catholic rite.⁶

370. By a non-Catholic minister is designated one who is a minister of any religious sect,—it is immaterial whether this sect be Christian, pagan, Jewish, heretical, or schismatic.⁷ He

sacris addictus adstat, et quasi parochi munere fungens; nam pars catholica ritui haeretico aut schismatico se consociaret, ex quo vetita omnibus haberetur cum haereticis in eorum sacris communicatio. Quare ita contrahentes mortaliter peccarent, ac monendi sunt."—S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 7.—*Fontes*, n. 1112.

⁴ "Lessius . . . id, salva conscientia, neque fieri, neque tolerari posse, contendit: eiusque opinio verissima esset, si haereticus ministellus adhiberetur tamquam persona sacra, quae sacram caeremoniam intenderet exercere, ac per eam, sanctitatem tribuere contractui matrimoniali; tunc siquidem viderentur Catholici eum agnoscere tanquam legitimum Christi Ministrum, ritumque haeticum approbare, et profiteri."—Benedictus XIV, *De Synodo Dioec.*, Lib. VI, cap. VII, n. 2. Cf. S. C. S. Off. (ad Ep. Osnabrugens.), 17 Feb. 1864.—*Fontes*, n. 976; Cappello, *De Sacram.*, III, n. 317; Vlaming, *Prael. Iuris Matr.*, n. 228; Wernz-Vidal, *Ius Canonicum*, V, n. 182; Ayinbuc, *Marriage Legislation*, p. 125.

⁵ Cf. Benedictus XIV, ep. encycl. *Inter omniagenas*, 2 Feb. 1744, §§ 9-11.—*Fontes*, n. 339; *De Synodo Dioec.*, Lib. VI, cap. VII, n. 2; S. C. de Prop. F., 12 Mart. 1897.—ASS, XXX (1897-1898), 158-159.

⁶ "An permitti possit, ut ante vel post matrimonium pars catholica etiam coram ministello acatholico ad praestandum consensum matrimoniale se sistat, si pars catholica in scriptis declaraverit mere passive se gerere et nullo modo ritui protestantico adhaerere velle. R. Negative, et detur Instructio 17 Februarii 1864."—S. C. S. Off., 10 Dec. 1902, ad 3.—*Fontes*, n. 1262. The Code does not require a formal *cautio*, however, to safeguard this prohibition (cf. Ayinbuc, *Marriage Legislation*, p. 120; De Smet, *De Spons. et Matr.*, n. 507), though there is nothing to prevent the Ordinary from exacting it if he so wishes.

⁷ "Comprehenduntur igitur etiam ministri ecclesiae sese dicentis catholicae independentis, quae in hac regione (Foederatis Statibus Americae) coepit propagari, quaeque inter suos ministros plures numerat sacerdotes, qui a catholica hierarchia sese subdixerunt."—Cipollini, *De Censuris*, Lib. II, n. 70.

acts in the capacity of a minister "*uti sacris addictus*" if he assists at the marriage by virtue of the fact that he is a minister of religion, not as a civil official deputed by the State to assist at marriages. If he is at the same time deputed by the civil authority to witness marriages he acts in his ministerial capacity if he uses any vestment of his office,⁹ or employs any religious rites or ceremonies.⁹ Presumably he act also in this capacity by the mere fact that he witnesses the marriage in a non-Catholic place of worship.

§ I. EXCOMMUNICATION

371. Catholics who violate this prohibition of giving or renewing their matrimonial consent before a non-Catholic minister "*uti sacris addictus*" incur *ipso facto* an excommunication reserved to the Ordinary.

CANON 2319

§ 1. *Subsunt excommunicationi latae sententiae Ordinario reservatae catholici:*

1° *Qui matrimonium ineunt coram ministro acatholico contra praescriptum can. 1063, § 1.*

This censure, following the general norms of all censures, implies the contumacy of the Catholic party.¹⁰ In the censure under consideration, ignorance of the law or of the penalty will excuse only if it is not affected, crass, or supine.¹¹ Absolution from the censure is normally to be given *in foro externo*, especially where

⁹ This refers rather to vestments that are worn at religious functions than to ministerial apparel worn on the street or about the house, such as a roman collar or the equivalent of a cassock or a habit.

⁹ Cf. S. C. S. Off., 27 Aug. 1658,—*Fontes*, n. 731; (Saxoniae), 29 Jan. 1817,—*Fontes*, n. 852; 2 Apr. 1847,—Roskovány, *De Matr. Mixtis*, III, p. 331. Words of congratulation, or even an exhortation, can perhaps be exempted from the designation of a rite or a ceremony if the minister acts as a civil official. Cf. Augustine, *Commentary*, V, p. 151-152. Ayrinhac (*Marriage Legislation*, p. 126) also seems to favor this opinion, but he demands that such words of advice have no confessional character. If the exhortation or words of advice were, however, addressed to them in a non-Catholic place of worship, there would be a strong presumption that they would be given as a part of a religious ceremony. Cf. Gasparri, *De Matr.*, n. 518; Cappello, *De Sacram.*, III, nn. 317-318; Wernz-Vidal, *Ius Canonicum*, V, n. 182.

¹⁰ Canon 2242, § 1.

¹¹ Canon 2229, § 1 et § 3, n. 1. Cf. Dargin, *Reserved Cases*, p. 48-51.

it has been notoriously incurred.¹² An absolution given in the internal sacramental forum by a priest who has the faculty to absolve will frequently suffice, especially if no grave scandal has been given,¹³ but canon 2251 must be kept in mind.¹⁴

372. Some authors stress the point that a double ceremony (i. e., before a non-Catholic minister and *coram Ecclesia*) is necessary that the censure be incurred.¹⁵

It seems to be quite certain from the wording of these two Canons [2319, § 1, n. 1 and 1063, § 1] that it is the double ceremony which is punished with excommunication by the Code. The reason for the censure may be the implied denial of the Church's exclusive jurisdiction over marriage. However it is not important to inquire into the reason of the law, because that does not affect the law one way or the other . . .

If there is question of one religious ceremony only, that before a non-Catholic minister, does the Catholic party incur the excommunication by the law of the Code? No, the former excommunication incurred by marriage before a non-Catholic minister, as minister of his religion, was inflicted on account of the forbidden communication in the sacred rites of a non-Catholic religion, as an Instruction of the S. Congregation of the Propaganda in 1858 states (*Collectanea S. C. de Prop. Fide*, N. 1154), Later declarations of the Holy See held that marriage before a non-Catholic minister was punished under the Bull *Apostolicae Sedis* with excommunication for the reason of communication in the sacred rites or as implied adherence to the non-Catholic faith. The Code does not retain that censure from the Bull *Apostolicae Sedis*, but holds the one who communicates in the religious rites of non-Catholics as suspected of heresy (cf. Canons 2316 and 1258), and such a one is to be admonished, according to Canon 2315, and if he does not amend within six months, he is to be considered a heretic.¹⁶

¹² Cf. Petrovits, *New Church Law on Matrimony*, n. 198; Dargin, *Reserved Cases*, p. 61.

¹³ Cf. De Smet, *De Spons. et Matr.*, n. 514; p. 450, not. 7; Vlaming, *Prael. Iuris Matr.*, n. 228; Prümmer, *Theol. Mor.*, III, n. 783; Hyland, *Excommunication*, p. 101-102.

¹⁴ "Si absolutio censurae detur in foro externo, utrumque forum afficit: si in interno, absolutus, remoto scandalo, potest uti talem se habere etiam in actibus fori externi: sed, nisi concessio absolutionis probetur aut saltem legitime praesumatur in foro externo, censura potest a Superioribus fori externi, quibus reus parere debet, urgeri, donec absolutio in eodem foro habita fuerit."—Canon 2251.

¹⁵ Linneborn, *Grundriss des Eherechts*, p. 171; Neuberger, *Canon 6*, p. 52; Woywod, in *HPR*, XXIV (1924), 510-511.

¹⁶ Woywod, *loc. cit.*

According to these authors, therefore, when canon 2319, § 1, n. 1, rules that Catholics who enter marriage before a non-Catholic minister contrary to the prescription of canon 1063, § 1, incur, *latae sententiae*, an excommunication reserved to the Ordinary, the conditions for the incurring of the censure must be interpreted in the light of canon 1063, § 1. But since canon 1063, § 1, refers to a double ceremony, the censure of canon 2319, § 1, n. 1, is incurred only when a double ceremony has taken place, namely, before a non-Catholic minister and *coram Ecclesia*.

373. The fact can, indeed, scarcely be questioned that in the law before the Code (and particularly after the constitution "*Apostolicae Sedis*") Catholics incurred an excommunication by daring to appear for a marriage ceremony solely before a non-Catholic minister, and, moreover, that this censure was in no way conditioned by a necessity of a double ceremony. Yet it is important to note how often the prohibition of appearing before a non-Catholic minister or the mention of the incurred censure is coupled with a reference to a double ceremony. The frequent reference to a double ceremony in the prohibitions of the Old Law offers a striking parallel to the same reference in canon 1063, § 1,—in fact, the expressions are so identical that the slight differences that exist may be regarded as totally irrelevant.¹⁷

¹⁷ "Quoad dubium autem:—Num sacramenta dari possint catholicae parti mente paratae ad ineundum coram ministro protestante *sive ante sive post catholicum matrimonium*? Attendum erit, an sponsi adeant ministrum protestantem ut legi tantum civili satisfaciant, an vero ut in sacris communicent etc."—S. C. S. Off., litt. (ad Vic. Ap. Myssurien.), 26 Nov. 1862,—*Fontes*, n. 971. A short time after, the Holy Office again gave an instruction regarding marriages before non-Catholic ministers. It begins by speaking of those cases that are not forbidden: "Tunc vero urgentibus haereticis, aut lege civili imperante, non improbatum quod pars catholica una cum haeretica se sistant, *ante vel post contractum ad formam Tridentini matrimonium*, etiam coram ministro haeresi addicto ad actum civilem dumtaxat implendum." Then without any departure from the reference to the double ceremony it enunciates the prohibition of appearing before a non-Catholic minister "*veluti sacris addictus*" and concludes: "Quod si tandem consensus coram paracho velit renovari, postquam praestitus iam fuerit coram ministro haeretico, idque publice notum sit, vel ab ipsis sponsis paracho notificetur: parochus huic matrimonio non intererit, nisi servatis, uti supponitur, ceteroquin servandis, pars catholica facti poenitens, praevis salutaribus poenitentis, *absolutionem a contractis censuris rite prius obtinuerit*."—S. C. S. Off. (ad Ep. Osnabrugens.), 17 Feb. 1864,—*Fontes*, n. 976. Though there was reference to a double ceremony (the very condition that prompted the in-

374. True, the censure of the constitution "*Apostolicae Sedis*"¹⁸ has undergone some modification in the Code. Instead of an attempted marriage before a non-Catholic minister "*uti sacris addictus*" entailing a censure by virtue of the implied inclusion of this *delictum* in the generality of acts forbidden by the constitution "*Apostolicae Sedis*", it now entails a censure dealing *specifically* with such a sin, and instead of being reserved to the Roman Pontiff it is now reserved to the Ordinary. But as far as the conditions required for the incurring of the censure are concerned, there has been no change whatever. If, then, in the Old Law the reference to a *doubleness* of ceremony was not a condition of incurring the censure, there is no reason why an identical reference to a double ceremony in canon 1063, § 1, should be construed as a condition of incurring the censure of canon 2319, § 1, n. 1. That the *doubleness* of ceremony is not required as a condition for incurring the censure of canon 2319, § 1, n. 1, is clearly indicated by the direction in the faculty given to American Bishops for the granting of a *sanatio in radice*. The entire faculty supposes a clandestine marriage already attempted before a civil official or a non-Catholic minister¹⁹ and that the consent of the parties has not been renewed *coram Ecclesia*. But with reference to the censure of canon 2319, § 1, n. 1, it directs: "*Ipse autem R. P. D. Ordinarius serio moneat partem catholicam de gravissimo patrato scelere, salutare ei poenitentias imponat, et SI CASUS FERAT, EUM AB EXCOMMUNICATIONE ABSOLVAT IUXTA COD. I. C. 2319, § 1, n. 1, simulque declaret ob sanationis gratiam a se acceptatam etc.*" The reference to the

struction) it is significant that the incurring of the censure and its absolution was in no way dependent upon the doubleness of ceremony, but rather upon the single ceremony before a non-Catholic minister "*veluti sacris addictus*". In another instance the Holy Office said: "*Illicitum porro ac sacrilegum est se sistere coram haeretico seu schismatico ministro ante vel post contractas mixtas nuptias, quoties ipse ut minister sacris addictus assistat . . .*" and the instruction concludes with the same reference to the necessity of absolution from the censure incurred by the *one* ceremony, as in the instruction of 1864.—S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, nn. 7-8,—*Fontes*, n. 1112. Vide etiam S. C. S. Off., 27 Aug. 1658,—*Fontes*, n. 731; (Hiberniae), 29 Nov. 1672,—*Fontes*, n. 751; 21 Apr. 1847,—Roskovány, *De Matr. Mixtis*, III, p. 331; 10 Dec. 1902, ad 3,—*Fontes*, n. 1262.

¹⁸ Pius IX, 12 Oct. 1869, § 1, n. 1,—*Fontes*, n. 552.

¹⁹ See No. 263.

absolution from the excommunication "*si casus ferat*" can refer only to the censure already entailed through a single ceremony before a non-Catholic minister "*uti sacris addictus*." If a double ceremony were necessary to entail the censure, what need of a *sanatio in radice* is referred to in the faculty for a marriage already contracted *coram Ecclesia*? The faculty itself, and its legitimate use, supposes that the marriage has been contracted clandestinely and that an obstacle exists to a renewal of consent *coram Ecclesia*.

375. When canon 1063, § 3, permits (where the civil law requires it) an appearance before a non-Catholic minister acting in his civil capacity, it uses the clause "*officialis civilis tantum munere fungente*" by direct contrast to the phrase "*uti sacris addictum*" of canon 1063, § 1. There is, moreover, a direct suggestion in canon 1063, § 3, that whatever might be the requirements of the civil law, the appearance before a non-Catholic minister "*uti sacris addictus*" would be prohibited by the prescription of canon 1063, § 1. Throughout the entire canon there is a reference to a *doubleness* of ceremony,—the question of prohibition or permission does not, however, hinge upon the *doubleness* of ceremony but on a far more vital issue, namely, the presence or absence of a "*communicatio in sacris*" with heretics. The basic reason of the prohibition in canon 1063, § 1, is, as in the Old Law, the "*communicatio in sacris*" with non-Catholic ministers,⁸⁰ nor is the prohibition conditioned any more by a *doubleness* of ceremony than it was in the Old Law. The reference to a *doubleness* of ceremony is in all likelihood a direct repetition of the same reference in so many decisions and instructions in the law before the Code. It has been the sad experience of the Church that a double ceremony takes place only too frequently, especially in connection with mixed or disparate marriages. In fact, many of the *dubia* formerly proposed, supposed this practice, and the answers in referring to this practice delineated only the norms of liceity and illicity. That is all that canon 1063 proposes to do, and its very position among the canons pertaining to mixed marriages suggests the historic

⁸⁰ See No. 369, notes 1-4 and also S. C. S. Off., 29 Aug. 1888,—NRT, XXII (1890), 137; 11 Maii 1892,—*Fontes*, n. 1154.

reason for the reference to a double ceremony. There is, however, not the slightest suggestion in canon 1063, § 1, that if only a non-Catholic ceremony took place, the *delictum* would not be forbidden by this very canon. It may be repeated, therefore, that the prescription of canon 1063, § 1 (to which canon 2319, § 1, n. 1, refers), is concerned primarily with the "*communicatio in sacris*" with non-Catholic ministers in appearing before them to give or to renew matrimonial consent. It is the violation of this prohibition, quite independent of any condition of a *doubleness* of ceremony, that entails the censure of canon 2319, § 1, n. 1.

376. Authors disagree also upon the question as to whether two Catholics contracting before a non-Catholic minister incur the censure of canon 2319, § 1, n. 1. Those authors who urge that two Catholics do not incur the censure point to the fact that canon 2319, § 1, n. 1, refers to a violation of the prescription of canon 1063, § 1, which seems to be concerned with mixed marriages. On the basis of the principle that penal laws must be interpreted strictly,²¹ two Catholics giving or renewing their consent before a non-Catholic minister would not, therefore, incur the censure of canon 2319, § 1, n. 1.²² Other authors take quite the opposite position and maintain the opinion that the censure of canon 2319, § 1, n. 1, refers to every marriage attempted before a non-Catholic minister.²³

377. If the decisions given after the constitution "*Apostolicae Sedis*" may serve as a guide of interpretation, their examination will reveal no distinction between mixed marriages, and marriages between Catholics. On the contrary, they appear rather to imply that any marriage attempted by a Catholic before a non-Catholic minister rendered the Catholic subject to

²¹ Cf. canons 19; 2219, §§ 1, 3.

²² Chelodi, *Ius Poenale*, p. 76, not. 1; Cappello, *De Censuris*, n. 369; Leech, *The Constitution "Apostolicae Sedis" and the "Codex Juris Canonici"*, p. 93.

²³ Petrovits, *New Church Law on Matrimony*, n. 270; Leitner, *Lehrb. des kath. Eherechts*, p. 241; Cocchi, *Comment.*, Vol. 8, n. 147; Cipollini, *De Censuris*, Lib. II, n. 70; Augustine, *Commentary*, VIII, p. 297; Neuberger, *Canon* 6, p. 52-53.

the censure reserved to the Holy See.²⁴ The fact that canon 1063, § 1, includes the contingency of a dispensation from the impediment of Mixed Religion must not be overemphasized in an attempt to force a strict interpretation of canon 2319, § 1, n. 1. The reason for placing the prohibition of canon 1063, § 1, among the canons referring to mixed marriages,²⁵ and of the reference of the canon to the event of a dispensation for a mixed marriage, in all likelihood lies in the fact that the *communicatio in sacris* in question most frequently occurs in connection with such marriages, and hence the wisdom of inserting the prohibition in the place it commands. Attention has already been called to the fact that the primary purpose of canon 1063, § 1, is the prohibition of a *communicatio in sacris* with non-Catholic ministers,²⁶ and that the prohibition is, therefore, in no way limited to mixed marriages alone. It is the violation of this prohibition that incurs the censure of canon 2319, § 1, n. 1. "The prescriptions of canon 1063, § 1, do not exclude an attempted marriage between two Catholics. Canon 1063, § 1, merely determines the law which must be violated to incur the censure of canon 2319."²⁷ It seems, therefore, that two Catholics attempting a marriage before a non-Catholic minister "*uti sacris addictus*" incur the censure of canon 2319, § 1, n. 1,²⁸ and in addition are rendered suspects of heresy by virtue of canon 2316.

²⁴ "Utrum absolutio a censuris omnibus catholicis, qui coram haeretico ministro nuptias contraxerunt necessaria sit, an potius in eo tantum casu impertienda sit, quo in huiusmodi celebrationem ab Antistite censurae promulgati sint? R. Affirmative ad primam partem, negative ad secundam."—S. C. S. Off., 29 Aug. 1888, ad I.—NRT, XXII (1890), 137. Vide etiam S. C. S. Off., 11 Maii 1892.—*Fontes*, n. 1154. The decision of the Holy Office of April 25, 1770 (Gasparri, *De Matr.*, n. 520), to the effect that two Catholics contracting before a non-Catholic minister did not incur censures, dates too far back to serve as a norm of interpretation. It may be classified in this respect with the decision of April 4, 1871 (see No. 377, note 30), which was later rejected.

²⁵ See also canon 1071. Cappello (*De Censuris*, n. 369) urges that disparate marriages by virtue of canon 1071 are subject likewise to the censure of canon 2319, § 1, n. 1, yet he grants the probability of the opinion excluding disparate marriages from the censure. Cf. Woywod in *HPR*, XXIV (1924), 510-511. It is hard to see how disparate marriages can in any way be excluded and how such an opinion can enjoy any probability.

²⁶ See No. 375.

²⁷ Neuberger, *Canon 6*, p. 53.

²⁸ Augustine (*Commentary*, V, p. 151, note 40) is of the opinion that the censure is not incurred by the proxy even though he be a Catholic. This opinion, however, seems to be in conflict with canon 2230.

A. CANON 2319, § 1, N. 1, AND THE THIRD PLENARY
COUNCIL OF BALTIMORE

378. In this connection must also be considered the legislation of the Third Plenary Council of Baltimore which prescribed:

Item decernimus Catholicos, qui coram ministro cuiuscumque sectae acatholicae matrimonium contraxerint vel attentaverint, extra propriam dioecesim, in quolibet statu vel territorio sub ditione praesulum qui huic concilio adsunt vel adesse debent, excommunicationem incurrrere Episcopo reservatam, a qua tamen quilibet dictorum Ordinariorum sive per se, sive per sacerdotem ad hoc delegatum absolvere poterit. Quod si in propria dioecesi ita deliquerint, statuimus eos ipso facto innodatos esse excommunicatione, quae, nisi absque fraude legis alium Episcopum adeant, eorum Ordinario reservatur.²⁹

There are two special points of interest involved in this prescription: 1) Did the prescription have any legitimate force at the time it was enacted? 2) In the event that it was a valid enactment, does it still retain its force after the Code?

379. The earlier decisions referring to censures incurred by Catholics who had given their matrimonial consent in mixed marriages before a non-Catholic minister, and requiring the necessity of absolution and the imposition of salutary penances,³⁰ retain their value only in so far as they were at least implicitly contained in the recast list of censures in the constitution "*Apostolicae Sedis*". In this constitution an excommunication, incurred *latae sententiae* and reserved to the Roman Pontiff, was incurred by the following: "*Omnes a christiana fide apostatas, et omnes ac singulos haereticos, quocumque nomine censeantur, et cuiuscumque sectae existant, eisque credentes, eorumque recepto-*

²⁹ Conc. Plen. Balt. III (1884), n. 127.

³⁰ Cf. S. C. S. Off., 2 Mart. 1842,—Gasparri, *De Matr.*, n. 523; (Georgia), 5 Aug. 1846, ad 3.—*Coll.*, n. 1009. In the light of these decisions it is somewhat surprising to find that a Council of Philadelphia held in 1842 reserved the censure for such a *delictum* to the Ordinary. Cf. Roskovány, *De Matr. Mixtis*, III, p. 303. On the other hand the Second Provincial Council of New Orleans held in 1860 (Decretum n. V) and the Second Diocesan Synod of Natchez held in 1869 (Decretum n. LXIV) decreed that Catholics, whether marrying Catholics or non-Catholics, incurred a censure reserved to the *Holy See* if they gave their consent before a non-Catholic minister.

res, fautores, ac generaliter quoslibet illorum defensores."³¹ A doubt apparently existed for a short time as to whether mixed marriages attempted before a non-Catholic minister were comprehended in this constitution for, soon after, the Holy Office declared that an absolution from censures was not necessary.³² In subsequent decisions, however, the Holy Office departed from this position and demanded the necessity of absolution.³³ The further implication that the censure was reserved to the Holy See was given in a decision of the Holy Office of May 11, 1892, which referred to the power of Ordinaries to absolve by virtue of their *quinquennial faculties*.³⁴

380. It was within this latter period, after the constitution "*Apostolicae Sedis*", that the Baltimore decree was enacted, —apparently in violation of the law which reserved the censure to the Holy See, for also in the law before the Code, it was forbidden to reserve censures to Ordinaries which had already been reserved to the Holy See.³⁵ On the other hand, the decrees of the Third Plenary Council of Baltimore were recognized and approved by the Holy See,³⁶ and in view of this approbation it appears that the enactment was recognized in spite of the apparent contradiction.

³¹ Pius IX, const. *Apostolicae Sedis*, 12 Oct. 1869, § 1, n. 1.—*Fontes*, n. 552.

³² To the *dubium*: "*Se sia regolare la prassi tenuta sin qui nei rescritti di dispensa nei casi in cui siasi contratto il matrimonio avanti il magistrato civile o il ministro protestante, di assolvere le parti contraenti dalle censure incorse*", the Holy Office replied on April 4, 1871,—"*Omittendam esse absolutionem a censuris*."—Wernz, *Ius Decret.*, IV, n. 588, not. 42.

³³ The decision of the Holy Office of March 17, 1874 (*Fontes*, n. 1029) demanded this in contrast to the decision of April 4, 1871. Vide etiam S. C. S. Off., 29 Aug. 1888.—*NRT*, XXII (1890), 137.

³⁴ "*Quid faciendum sit de iis catholicis qui secundum veterem dioecesium nostrarum (in Borussia) usum, licet coram ministro acatholico matrimonium contraxerint, a confessariis sine speciali facultate absolvendi ad ss. sacramenta admissi sunt.*"

R. Qui matrimonium coram ministro haeretico ineunt, censuram contrahere; Ordinarios autem vi facultatum quinquennialium nedum posse eos absolvere, sed alios etiam subdelegare ad eosdem absolvendos. Qui vero huc usque, nulla praevia a censuris absolutione, ab huiusmodi culpa absoluti sunt, iuxta exposita non esse inquietandos,"—*Fontes*, n. 1154.

³⁵ Cf. S. C. S. Off., instr. 13 Iul. 1916, n. 4.—*Fontes*, n. 1302; S. C. Ep. et Reg., litt. 26 Nov. 1602,—*Fontes*, n. 1615. The law in the Code is expressed in canon 2247, § 1.

³⁶ "Itaque Emi. Patres Sacro Consilio Christiano Nomini Propagando praepositi in generalibus comitiis habitis diebus 17, 24, 27, et 31 mensis Augusti, nec non die 5 Septembris anni 1885, diligenti inquisitione adhibita,

381. If it is true that Catholics attempting any marriage before a non-Catholic minister "*uti sacris addictus*" incur, *latae sententiae*, an excommunication reserved to the Ordinary by virtue of canon 2319, § 1, n. 1, the Baltimore legislation may be regarded as supplanted by the common law of the Code. Catholics in the United States who attempt such marriages will not, therefore, incur two censures,—one by virtue of the Council of Baltimore, and one by virtue of canon 2319, § 1, n. 1,⁸⁷ but only one censure by virtue of the common law of the Code.⁸⁸ The prescription of the Council of Baltimore that if Catholics contracted such a marriage within their own diocese, the absolution would be reserved to their proper Ordinary, has been abrogated by the Code in canon 2247, § 2.⁸⁹

§ II. DUTIES OF THE PASTOR

382. Canon 1063, § 2, directs that if the pastor knows for certain that the parties will violate the prohibition expressed

atque omnibus accurato studio debitoque iudicii maturitate pensatis, Decreta eiusdem Concilii expenderunt et nonnullis emendationibus ac modificationibus adiectis, eadem ut ab omnibus ad quos spectat inviolabiliter observentur recognoverunt. Hanc autem S. Congregationis sententiam Summo Pontifici Leoni XIII a R. P. D. Dominico Iacobini eiusdem S. Congregationis Secretario in Audientia diei 10 Septembris 1885 relatum, Sanctitas Sua benigne approbare dignata est, et super his praesens Decretum expediri mandavit."—S. C. de Prop. F., decret., 21 Sept. 1885,—*Acta et Decreta*, Conc. Plen. Balt. III (1884), p. XV-XVI. Whatever corrections were to be made, there is no suggestion that they concerned the decree in question for these decrees were published in 1886 in the form in which they are now known. Moreover, many other diocesan synods thereafter reserved this censure to the Ordinary,—with reference to the marriage of a Catholic (regardless of whether it be with another Catholic or a non-Catholic) before a non-Catholic minister. Cf. Synodus Dioecessana Natchetensis V (1886), n. XXXIX; Constitutiones Dioecessanae Bostoniensis (1886), n. 132; Synodus Dioecessana Manchesteriensis I (1886), n. 148; Albanensis IV (1887), n. 107; Providentiensis (1887), n. 83; Omahanensis (1887), n. 97; Sanctae Fidei I (1888), n. 9; Neo-Aurelianensis V (1889), n. LV; Wayne-Castrensis (1903), n. 174.

⁸⁷ Cf. Chelodi, *Ius Poenale*, p. 38, not. 2.

⁸⁸ This opinion is not in violation of canon 2244, § 2, n. 3, which says that censures incurred *latae sententiae* are multiplied: "*Si delictum, diversis censuris a distinctis Superioribus punitum, semel aut pluries committatur.*" The phrase "*diversis censuris*" can readily be understood to mean censures specifically different. Cf. Dargin, *Reserved Cases*, p. 56.

⁸⁹ "Reservatio censurae in particulari territorio vim suam extra illius territorii fines non exserit, etiamsi censuratus ad absolutionem obtinendam e territorio egrediatur; censura vero ab homine est ubique locorum reservata ita ut censuratus nullibi absolvi sine debitis facultatibus possit."—Canon 2247, § 2. Cf. Dargin, *op. cit.*, p. 73-76. The latter part of this canon, with its reference to censures *ab homine*, has no reference to the censure established *a iure* by the Council of Baltimore.

in canon 1063, § 1, or have already violated it, he shall not assist at their marriage except for the gravest reasons, all danger of scandal having been removed, and the Ordinary having been consulted. The prohibition of this canon is concerned primarily with the pastor's assistance, and in this it is similar to canon 1065, § 2. If, therefore, the pastor is *certain*⁹⁰ that the parties, after the marriage *coram Ecclesia*, will go also before a non-Catholic minister to give their matrimonial consent, or if he is asked by the parties concerning this matter, he cannot remain silent but must warn the parties of the crime they will commit, and of the excommunication to be incurred.⁹¹ If they still persist in their intention, the pastor is forbidden to assist at their marriage until he has consulted the Ordinary, who is to judge of the effectiveness of the removal of scandal and of the gravity of the causes. The pastor must follow the Ordinary's decision.

383. If, on the other hand, the pastor foresees (though he does not know for certain) that the parties will go before a non-Catholic minister, and if he also foresees that they will not heed his warning, he can, to avoid grave evils, remain silent and assist at their marriage, provided there is no danger of scandal, and that in the case of a mixed or disparate marriage, a dispensation has been given.⁹² He is not always bound

⁹⁰ "Certe noverit. Darin liegt wohl stillschweigend eine Ausweisung an die Praxis, milde zu verfahren und wenn möglich die Dissimulation anzuwenden."—Schönsteiner, *Grundriss des kirchl. Eherechts*, p. 36.

⁹¹ "Sciant insuper parochi, si interrogentur a contrahentibus, vel si certe noverint eos adituros ministrum haereticum sacris adductum ad consensum matrimonialem praestandum, se silere non posse; sed monere eosdem debere sponso de gravissimo peccato quod patrant, et de censuris in quas incurrunt."—S. C. S. Off. (ad Ep. Osnabrugens.), 17 Feb. 1864.—*Fontes*, n. 976. Vide etiam S. C. S. Off. (Hiberniae), 29 Nov. 1672.—*Fontes*, n. 751; 17 Jan. 1872, ad II.—*Fontes*, n. 1020; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 8.—*Fontes*, n. 1112.

⁹² "Verumtamen ad gravia praecavenda mala, si in aliquo peculiari casu parochus non fuerit interpellatus a sponso, an liceat nec ne adire ministrum haereticum, et nulla fiat ab iisdem sponso explicita declaratio de adeundo ministrum haereticum, praevideat tamen eos forsan adituros ad matrimonialem renovandum consensum, ac insuper ex adiunctis in casu concurrentibus praevideat monitionem certo non fore profuturam, immo nocituram, indeque peccatum materiale in formalem culpam vertendum, tunc sileat, remoto tamen scandalo, et dummodo aliae ab Ecclesia requisitae conditiones, atque cautiones rite positae sint. . . ."—S. C. S. Off. (ad Ep. Osnabrugens.), 17 Feb. 1864.—*Fontes*, n. 976. Vide etiam S. C. S. Off., 17 Jan. 1872, ad II.—*Fontes*, n. 1020; (Engolismen.), 27 Mart. 1878, ad 2.—*Coll.*, n. 1490; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 8.—*Fontes*, n. 1112.

to inquire as to this intention of the parties, even if he foresees that they will go before a non-Catholic minister." If a marriage has already been attempted before a non-Catholic minister "*uti sacris addictus*", the pastor may not assist at the renewal of consent until he has first consulted the Ordinary who, with due consideration for the removal of scandal and the gravity of the causes urged, will either refuse or grant the permission for the pastor's assistance." Catholics who have been guilty of this sin must first receive an absolution from the censure of canon 2319, § 1, n. 1, which is to be given only upon the manifest signs of repentance." Where mixed or disparate marriages are concerned, a dispensation from the impediment⁴⁶ must likewise precede the pastor's assistance, and if it is a question of marriages prohibited by canons 1065 and 1066, the further permission of the Ordinary for the pastor's assistance.

ART. II. BEFORE A NON-CATHOLIC MINISTER IN HIS CIVIL CAPACITY

384. When the civil law demands it, the parties are not forbidden to present themselves before a non-Catholic minister acting as a civil official, solely to comply with a civil formality and for the sake of civil effects." Such an act does not involve the *communicatio in sacris* with non-Catholic ministers forbidden by canon 1063, § 1. If, however, a civil ceremony has taken place, the parties may not cohabit until they have contracted a *valid marriage coram Ecclesia*,⁴⁷ and under normal conditions

⁴⁶ "An parochus timens, vel praevidens partem catholicam etiam ministrum acatholicum esse aditurum, teneatur circa hanc intentionem catholicae sponsae inquirere . . . R. Non teneri inquirere."—S. C. S. Off., 22 Jan. 1851,—Feije, *De Imped. et Dispens.*, p. 459, not. 1.

⁴⁷ If such marriages have been contracted validly before a non-Catholic minister "*uti sacris addictus*" by virtue of canon 1098, n. 1, Catholics are not to be admitted to the sacraments until they have first received an absolution from the censure of canon 2319, § 1, n. 1. Cf. S. C. S. Off., litt. (ad Vic. Ap. Myssurien.), 26 Nov. 1862,—*Fontes*, n. 971.

⁴⁸ Cf. S. C. S. Off. (ad Ep. Osnabrugen.), 17 Feb. 1864,—*Fontes*, n. 976; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 8,—*Fontes*, n. 1112.

⁴⁹ Canon 2375 must likewise be kept in mind.

⁵⁰ Canon 1063, § 3.

⁵¹ A marriage (even before a non-Catholic minister) could be validly contracted if the conditions of canon 1098, n. 1 are realized, since the presence of a priest is not required for the *validity* of marriages contracted in such cir-

this should take place *quam primum*.⁴⁰ From the point of view of the scandal arising, the parties are not permitted to present themselves before a minister acting as a civil magistrate, where the civil law does not demand it.⁴¹ In urgent necessity, in order to avoid grave evils, the Catholic party may, perhaps, be permitted to present himself before a non-Catholic minister acting in his civil capacity if the non-Catholic party absolutely insists upon it,—even though the civil law would not demand it.⁴² The absolute silence, however, of canon 1063, § 3, upon such a provision may render the former tolerance a very doubtful guide for the present practice. Moreover, if in such a case the non-Catholic party insists upon going before the minister of his sect in preference to others, there is a strong presumption that there will be a *communicatio in sacris*.⁴³ Since the civil laws of the United States of America do not demand a civil in addition to a religious ceremony, there can be little excuse for the parties approaching a minister even though he acts as a civil magistrate.⁴⁴ Exception may, perhaps, be made for situations such as those contemplated in canon 1098, n. 1, where the minister would be the only civil official in the locality, and when the parties would present themselves before him merely to secure the civil effects of their contract. This, of course, presupposes that no canonical impediments exist, or if they exist, that they have been dispensed from by the Church.

cumstances. See canon 1098, n. 2. If the parties approached the minister acting in a civil capacity, they would incur no censure by the common law of the Code.

⁴⁰ Cf. Benedictus XIV, ep. *Redditae sunt*, 17 Sept. 1746, § 4.—*Fontes*, n. 372; Wernz, *Ius Decret.*, IV, n. 208.

⁴¹ Cf. Cerato, *Matr.*, n. 57; Cappello, *De Sacram.*, III, n. 318.

⁴² "Utrum catholicus coram proprio catholico parrocho cum haeretica contrahens licite possit, urgentibus haereticis, matrimonium hoc ratificare coram ministro haeretico, si nulla hinc ritus haeretici professio habeatur aut colligatur, et quidquid minister haereticus in casu peragit, civilis dumtaxat et politica gratulatio sit ac censeatur. R. Affirmative."—S. C. S. Off., 14 Nov. 1748.—*Fontes*, n. 799. Vide etiam S. C. S. Off. (ad Ep. Osnabrugem.), 17 Feb. 1864.—*Fontes*, n. 976; instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 7.—*Fontes*, n. 1112; Cappello, *op. cit.*, III, n. 318.

⁴³ S. C. de Prop. F., 12 Mart. 1897,—*ASS*, XXX (1897-1898), 158-159. Cf. Augustine, *Commentary*, V, p. 152.

⁴⁴ Cf. Woywod, *A Practical Commentary*, I, n. 1042.

ART. III. THE APOSTOLIC LETTER "Provida" AND PASSIVE ASSISTANCE

385. After the decree "*Ne Temere*" there existed only two exemptions from the universal law of the Latin Church regarding the form of marriage. One existed for Germany by virtue of the apostolic letter "*Provida*", that was later also extended to Hungary;⁶⁴ the other in the form of a continued tolerance of passive assistance exclusively in those regions where it had formerly⁶⁵ been permitted by the Holy See.⁶⁶ The exemption granted by the apostolic letter "*Provida*" was abolished by canon 1099 of the Code.⁶⁷ Passive assistance was also abolished by the Code for canon 1102, § 1, directs: "*In matrimoniis inter partem catholicam et partem acatholicam interrogationes de consensu fieri debent secundum praescriptum can. 1095, § 1, n. 3.*"⁶⁸

386. Some authors, who wrote after the Code, continued to subscribe to the opinion that passive assistance could still be employed in the regions where it was formerly tolerated.⁶⁹ The Pontifical Commission for the Authentic Interpretation of the

⁶⁴ See No. 113, note 87.

⁶⁵ See No. 106, notes 57-58.

⁶⁶ "Praescriptionem Decreti *Ne Temere*, n. IV, § 3, de requirendo per parochum excipiendoque, ad validitatem matrimonii, nupturientium consensu, in matrimoniis mixtis in quibus debitas cautiones exhibere pervicaciter partes renuant, locum posthac non habere; sed standum *taxative* praecedentibus Sanctae Sedis ac praesertim s. m. Gregorii PP. XVI (Litt. ap. diei 30 Aprilis 1841 ad episcopos Hungariae) ad rem concessionibus et instructionibus; facto verbo cum SSmo."—S. C. S. Off. 21 Jun. 1912,—AAS, IV (1912), 444. Vide etiam S. C. Concilii, 27 Jul. 1908,—*Apollinaris*, I (1928), 340; S. C. S. Off., 5 Aug. 1916,—AAS, VIII (1916), 316. In this connection, the Second Diocesan Synod of Kansas City held in 1912 decreed (Decretum n. 141, 4): "*In casu vero quo pars catholica receptionem poenitentiae sacramenti recusaverit, rector tali matrimonio passive assistere debet.*" What precisely was meant by "*passive assistere*" is not indicated.

⁶⁷ "Ad dubium autem utrum Consitutio [*"Provida"*] illa canone 1099 novi Codicis, ut *lex particularis*, abrogata esset (ad normam can. 6, n. 1), an potius, ut *privilegium*, non obstante can. 1099, persisteret, Com. Pont. Codici interpretando praeposita die 9 Dec. 1917 respondit, *esse abrogatam* (Strassb. Dioezesanbl. 1918, S. 97), quod similiter ab Emin. Secretario Status die 30 Mart. responsum fuit clo. Schaepman, de consensu Illmi Archiepi Ultraiecten. idem sciscitanti."—Vlaming, *Prael. Iuris Matr.*, I, p. 200, not. 2.

⁶⁸ "Parochus et loci Ordinarius valide matrimonio assistant: n. 3.—Dummodo neque vi neque metu gravi constricti requirant excipiantque contrahentium consensum."—Canon 1095, § 1, n. 3. See canon 1064, n. 4.

⁶⁹ A reference to some of these authors may be found in Schönsteiner, *Grundriss des kirchl. Eherechts*, p. 35, and Cappello, *De Sacram.*, III, n. 715, not. 4.

Code put an end to all doubts on this score when on March 10, 1928, it gave an affirmative answer to the following *dubium*: "*An canone 1102, § 1, revocata sit facultas, alicubi a S. Sede concessa, passive assistendi matrimoniis mixtis illicitis.*"⁸⁸ The reply indicates that the Church is quite unwilling that such a tolerated assistance shall again be permitted, and hence the opinion sponsored by De Smet⁸⁹ and Farrugia⁹⁰ that an Ordinary could have recourse to such assistance in cases of urgent necessity by virtue of canon 81, seems to be at variance with the mind of the Holy See.⁹¹

ART. IV. THE PROHIBITION OF ALL SACRED RITES

387. While passive assistance has thus been abolished, and the matrimonial consent of the parties must be asked in conformity with canon 1102, § 1, all sacred rites are, moreover, prohibited. If, however, greater evils are foreseen to follow from a strict adherence to this prohibition, the Ordinary may permit some of the usual ecclesiastical ceremonies, always to the exclusion of the celebration of Mass.

CANON 1102, § 2

*Sed omnes sacri ritus prohibentur; quod si ex hac prohibitione graviora mala praevideantur, Ordinarius potest aliquam ex consuetis ecclesiasticis caeremoniis, exclusa semper Missae celebratione, permittere.*⁹²

The reason for the prohibition is manifest. If Ordinaries and pastors have the grave obligation to employ those means at their command in deterring the faithful from contracting mixed and disparate marriages, they must conduct themselves consistently. The sacred rites of the Church may not, therefore, be used at such marriages since they imply an approbation of the Church.

⁸⁸ AAS, XX (1928), 120. Vide etiam S. C. S. Off., 26 Nov. 1919,—*AkkR*, C (1920), 28.

⁸⁹ *De Spons. et Matr.*, p. 448, not. 4.

⁹⁰ *De Matr.*, n. 246.

⁹¹ Maroto, "*De Matrimoniis Mixtis Illicitis*", *Apollinaris*, I (1928), 342.

⁹² See also canons 1064, n. 4; 1071.

In employing such rites the Ordinaries and pastors would appear to approve what they have disapproved by their teaching."

388. Ever since the Church has begun to grant dispensations for mixed and disparate marriages, the use of any blessing for such marriages has been constantly forbidden." The prohibition contemplates all blessings" (even of the ring)," the use

" "Nunquam enim tolerari debet, ut sacrilegis hisce contractibus sacri ritus admisceantur, et sacerdotes Dei videntur suo facto probare, quod ore illicitum esse edocent et praedicant. Atque id probe sentiunt adversarii nostri, qui certe in huiusmodi nuptiis de catholici sacerdotis benedictione minime laborarent, nisi intelligerent illam conducere ad extenuendam, atque adeo ad obliterandam sensim in catholici populi animis memoriam canonum, qui haec detestantur connubia, et constantissimi studii, quo sancta mater Ecclesia filios suos avertere consuevit ab iisdem coniugiis in eorum futuraeque prolis perniciem contrahendis. [To this is added the following interesting observation]. Nostri scilicet contradictores cognoscunt, si res ex eorum votis succederet, facile inde futurum, ut catholicae potissimum foeminae aut licita aut non tam graviter illicita existimarent ea coniugia, quae sacris Ecclesiae ritibus et sacerdotali benedictione honestari viderent."—Gregorius XVI, ep. *Non sine gravi*, 23 Maii 1846, n. 2.—*Fontes*, n. 503. Vide etiam Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; S. C. S. Off., instr. (ad Ep. S. Alberti), 9 Dec. 1847,—*Coll.*, n. 1427.

" See No. 107, note 60. Already at the time of Pope Clement VIII blessings were forbidden to be imparted to mixed marriages. "*Matrimonia Catholicorum cum Aatholicis non sunt benedicienda. Plures enim summi Pontifices, praesertim Clemens VIII, expresse prohibuerunt, ne huiusmodi connubiis sacerdotalis benedictio impendatur.*"—*Rituale Romanum*, Suppl. pro Prov. Am. Septentr. Foed., p. 10. Cf. Benedictus XIV, *De Synodo Dioec.*, Lib. VII, cap. V, n. 5. Dom Chardon refers this prohibition of the blessing to the marriage of Henry of Bavaria and Catherine of Navarre (see No. 86): "Le pape Clément VIII usa de cette dispense envers le duc de Bar, qui l'avait longtemps sollicité de réhabiliter son mariage avec Catherine de Bourbon, soeur de Henri IV. Le pape . . . lui permit de se marier avec cette princesse en présence du curé de la paroisse et de deux témoins, sans aucune bénédiction nuptiale, en cas que le concile de Trent eût été publié en Lorraine, ou bien en se donnant de nouveau le consentement mutuel, s'il n'y était pas publié."—*Histoire du Sacrement de Mariage*, Chap. XIII,—Migne, *Theol. Cours. Complet.*, XX, 1119.

" It includes also the nuptial blessing given outside of the Mass by one having this permission by Apostolic Indult. Cf. *Rituale Romanum*, Appendix, *De Matr.*, I. At times there were some very unusual exceptions to the prohibition of sacred rites in the law before the Code. "*Attamen si agatur de matrimoniis mixtis coram haeretico ministro iam contractis* [the context of the decision supposes that they are validly contracted in places not subject to the decree "*Tametsi*"], *quatenus cautiones a iure necessariae praestitae fuerint, et pars catholica facti poenitens benedictionem petat, poterit ei, praevia absolute a censuris, impositisque salutaribus poenitentiis, benedictio impertiri, exclusa tamen semper Missae celebratione.*"—S. C. S. Off., litt. (ad Vic. Ap. Myssuriens.), 26 Nov. 1862,—*Fontes*, n. 971. Vide etiam S. C. S. Off., instr. (ad omnes Ep. Ritus Orient.), 12 Dec. 1888, n. 8.—*Fontes*, n. 1112.

" S. C. S. Off., 1 Aug. 1821.—*Fontes*, n. 863; 17 Jan. 1877, ad 3 et 4.—*NRT*, XX (1888), 463-464. Vlaming (*Prael. Iuris Matr.*, n. 225) is of the opinion that the pastor could bless the ring privately, though the opinion given by Petrovits (*New Church Law on Matrimony*, n. 197) and

of liturgical vestments," prayers," and sacred rites." Above all is forbidden the celebration of Holy Mass which could in any way be construed as a complement of the celebration of the mixed or disparate marriage." A formal sermon which would be the equivalent of any act of approbation is forbidden, though a short exhortation may be given if the Bishop permits it." Ap-

Tanquary (*Theol. Mor.*, I, n. 914), allowing this upon the Ordinary's permission, is more in accord with the decisions. In the United States the un-blessed ring is placed on the bride's finger. Cf. *Rituale Romanum*, Suppl. pro. Prov. Am. Septentr. Foed., p. 12; *The Priest's New Ritual* (compiled by Rev. P. Griffith), Baltimore, 1914, p. 199.

⁶⁶ Pius VI, rescript. ad Card. Archiep. Mechlinien., 12 Jul. 1782, n. 4,—*Fontes*, n. 471; S. C. S. Off., instr. (ad Ep. S. Alberti), 9 Dec. 1847,—*Coll.*, n. 1427; 17 Jan. 1877, ad 3 et 4,—*NRT*, XX (1888), 463-464; (Rosen.), 16 Jul. 1885,—*Fontes*, n. 1094. Such vestments as a surplice and stole are forbidden, but not such as a cassock, or the customary dress of prelates. Cappello, *De Sacram.*, III, n. 716; Rossi, *De Matr. Celebratione*, n. 99, not. 22.

⁷⁰ Pius VI, loc. cit.; instr. 19 Jun. 1793,—Migne, *Theol. Curs. Complet.*, XXV, 682; Pius VIII, litt. ap. *Litteris altero*, 25 Mart 1830.—*Fontes*, n. 482; S. C. S. Off., 1 Aug. 1821,—*Fontes*, n. 863; instr. (ad Ep. S. Alberti), 9 Dec. 1847,—*Coll.*, n. 1427. *The Priest's New Ritual* [(compiled by Rev. P. Griffith), Baltimore, 1914, p. 199-200] has a prayer in the vernacular that is apparently permitted though it is not contained in the supplement for the United States of the *Rituale Romanum*.

⁷¹ Canon 1102, § 2. The Sixth Provincial Council of Baltimore (1846) determined to petition the Holy See to use some of the sacred rites in the following words (n. 1): "*Censuerunt Patres expedire ob specialia locorum adiuncta, ut preces porrigantur ad Sedem Apostolicam, ut liceat in Matrimonii mixtis ritus in Rituali Romano praescriptos usque ad Annuli benedictionem et traditionem inclusive adhibere, servata semper conditione de Catholicae partis libero religionis exercitio, et prolis utriusque sexus in fide Catholica educatione, iuxta Decretum I. concilii Provincialis IV.*" Cardinal Fransonius, in his letter of July 3, 1847, to Archbishop Eccleston, replied, however, that no religious rite could be employed. See infra No. 108.

⁷² "An canone 1102, § 2. in matrimoniis mixtis, praeter Missam pro sponsis, prohibeatur etiam alia Missa, licet privata. R. Affirmative, si haec Missa ex rerum adiuncta haberi possit uti complementum caeremoniae matrimonialis."—Pont. Comm., 10 Nov. 1925.—*AAS*, XVII (1925), 583. The same reply was given in a much earlier decision,—S. C. S. Off., 17 Jan. 1872, ad 1,—*Fontes*, n. 1020. Vide etiam Instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; S. C. S. Off., litt. (ad Vic. Ap. Myssurien.), 26 Nov. 1862,—*Fontes*, n. 971; instr. (ad Archiep. Corcyren.), 3 Jan. 1871, n. 5,—*Fontes*, n. 1013; 17 Jan. 1877, ad 5,—*NRT*, XX (1888), 463-464. There were, however, earlier exceptions to this rule. See No. 392, notes 86, 88.

⁷³ Cf. S. C. S. Off., 17 Jan. 1877, ad 4.—*NRT*, XX (1888), 463-464; (Rosen.), 16 Jul. 1885,—*Fontes*, n. 1094. The custom in the United States has been to give a short exhortation. Such a permission already appeared in earlier diocesan synods (e. g., S. Ludovici [1850], n. XVII; Natchitochensis II [1869], n. LXI), and in the Baltimore Ritual of 1873 (printed by John Murphy), p. 546. At present, examples of such exhortations are found in the supplement to the *Rituale Romanum* (p. 12-15)

parently the only cause recognized" (to the exclusion of others) for any exception to the prohibition of canon 1102, § 2, is the avoidance of graver evils, which may readily arise because of the customs of a locality or because of the circumstances of a particular case.⁷⁵

§ I. SACRED RITES IN CONNECTION WITH MARRIAGES FORBIDDEN BY CANONS 1065 AND 1066

389. A certain disagreement exists among the authors as to the use of sacred rites in assisting at marriages prohibited by canons 1065 and 1066. Some authors are of the opinion that since canon 1102, § 2, does not explicitly or implicitly refer to the marriages of Catholics with those who have notoriously left the Faith or joined condemned societies, or with public sinners or those notoriously under censure, it cannot, therefore, be used as a norm for such marriages. Further attention is directed to the point that nowhere else in the Code is there a canon referring either explicitly or implicitly to the prohibition of sacred rites or the celebration of Mass for such marriages. This silence of the Code must, therefore, be construed as an abrogation of the prescriptions of former decrees forbidding the celebration of Mass or the use of sacred rites.⁷⁶ Other authors, however, hold that the

and in *The Priest's New Ritual* (p. 194-197). Cf. Konings-Putzer, *Comment. in Facult.*, p. 384; Petrovits, *New Church Law on Matrimony*, n. 511; Augustine, *Commentary*, V, p. 309; Tanquary, *Theol. Mor.*, I, n. 914.

⁷⁵ The following are exemplary causes recognized as sufficient: "a) quotiescumque, ob denegatam matrimoniis mixtis benedictionem, faciles excitentur haereticorum quaeremoniae et odia adversus fideles legesque ecclesiasticas; b) quotiescumque (timendum esset ne), denegata a parochio catholico benedictione, sponsi . . . ministellum adeant . . . ; c) quotiescumque insuper timendum esset quod, recusata ab ipsis expetita benedictione, aut non serviantur necessariae cautiones . . . aut, quod detestabilius foret, ne pars catholica ad haereticorum castra, in sui et futurae prolis aeternam perniciem, transiret."—S. C. de Prop. F., ep., 4 Dec. 1862,—De Smet, *De Spons. et Matr.*, p. 446, not. 1.

⁷⁶ Cf. instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858,—*Coll.*, n. 1169; S. C. S. Off., instr. (ad Archiep. Corcyren.), 3 Jan. 1871. n. 5,—*Fontes*, n. 1013; 17 Jan. 1877,—*NRT*, XX (1888), 462-464; S. C. de Prop. F., ep., 4 Dec. 1862,—De Smet, *loc. cit.*; litt. encycl., 11 Mart. 1868,—*Coll.*, n. 1324.

⁷⁷ Quigley (*Condemned Societies*, p. 106) is of the opinion that the celebration of Mass is permitted, but that the Ordinary for reasons of scandal may prohibit it. Cf. Vlaming, *Prael. Iuris Matr.*, n. 250; Cerato, *Matr.*, n. 59. Wernz-Vidal (*Ius Canonicum*, V, nn. 201, 203) states the opinion with more caution to the effect that the celebration of Mass or the use of

decisions before the Code may still be invoked as a norm and require the Ordinary's permission for the celebration of Mass or the use of sacred rites.⁷⁷

390. While, indeed, no canon in the Code makes explicit reference to the prohibition of the celebration of Mass and the use of sacred rites for the marriages in question, canon 2260, § 1, states, nevertheless, that those excommunicated by a declaratory or a condemnatory sentence cannot receive the sacramentals. If, then, the bride is so excommunicated, she cannot receive the nuptial blessing since this is an invocative blessing.⁷⁸ Moreover, if either of the parties is excommunicated, the public prayers and sacrifice of the Nuptial Mass seem to be excluded by virtue of canon 2262, § 1.⁷⁹ If then, there is at least an implicit reference of the Code to a prohibition of the nuptial blessing in certain instances, and of the celebration of the Nuptial Mass, it is not at all certain that the decisions of the past have been abrogated. In the law before the Code the use of sacred rites was forbidden for marriages of Catholics with those under censure;⁸⁰ with Masons,⁸¹ or those notoriously members of secret societies ("in quo una contrahentium pars clandestinis aggregationibus notarie adhaeret").⁸² It was left to the Ordinary to determine ("quae magis in Domino expedire iudicaverit") in each particular case whether the sacred rites could be permitted. The celebration of

sacred rites do not appear to be absolutely excluded. Leitner (*Lehrb. des kath. Eherechts*, p. 251) permits the celebration of Mass if there is no question of a condemnatory or declaratory sentence of excommunication. Petrovits (*New Church Law on Matrimony*, nn. 200, 203) and Farrugia (*De Matr.*, n. 140) seem to require a recourse to the Ordinary, who in their opinion may, however, permit the full ritual and even the celebration of Mass. Petrovits (*ibid.*, n. 203) requires a *causa gravissima* if the excommunicated party be a *vitandus*.

⁷⁷ Chelodi, *Ius Matr.*, n. 67; Pighi, *De Matr.*, n. 34; Augustine, *Commentary*, V, p. 157. See also the preceding note and AER, LXXIV (1926), 310-311.

⁷⁸ Cf. Hyland, *Excommunication*, p. 78-80; Pashang, *The Sacramentals according to The Code of Canon Law*, Washington, 1925, p. 73.

⁷⁹ "Excommunicatus non fit particeps indulgentiarum, suffragiorum, publicarum Ecclesiae precum."—Canon 2262, § 1. The *private* character of the application of the ministerial fruits of the Mass (permitted by § 2, n. 2, of the same canon) is scarcely to be presumed for a Nuptial Mass.

⁸⁰ S. Poenit., 10 Dec. 1860,—Feije, *De Imped. et Dispens.*, n. 277.

⁸¹ S. C. S. Off. (S. Bonifacii), 23 Apr. 1873.—*Fontes*, n. 1026; instr. (ad Ordinarios Imperii Brasil.), 2 Jul. 1878,—*Fontes*, n. 1056.

⁸² S. C. S. Off. (Bombay), 21 Feb. 1883,—*Fontes*, n. 1079.

Mass was to be excluded unless the gravity of the circumstances demanded a relaxation of the prohibition.¹³

391. The character of the notoriety emphasized in canons 1065 and 1066 indicates clearly that the element of scandal demands careful consideration. The scandal of such marriages can arise not merely from the fact that they are contracted at all, but also from the fact that they are contracted with the solemn blessing and approbation of the Church. It seems, therefore, that the decisions antedating the Code must be used as a norm; that ordinarily the use of sacred rites and the celebration of Mass are prohibited unless the Ordinary sees fit to permit some or all of the rites, and even the celebration of Mass.¹⁴ There seems to be no clear prohibition in the Code or in any of the decisions as to the celebration of such marriages in a Church. The Ordinary may, however, forbid their celebration in a Church if he foresees that grave scandal will arise if they do take place in a Church.

ART. V. THE PLACE OF CELEBRATION

CANON 1109, § 3

Matrimonia vero inter partem catholicam et partem acatholicam extra ecclesiam celebrentur; quod si Ordinarius prudenter iudicet id servari non posse quin graviora oriantur mala, prudenti eius arbitrio committitur hac super re dispensare, firmo tamen praescripto can. 1102, § 2.

392. Though the celebration in a church of mixed and disparate marriages has been universally forbidden at least within the last century and a half, the exact time of the origin of this discipline is, perhaps, not altogether evident. In many sections of the Western Church, particularly in England and in France, marriages even among Catholics were contracted at the church-

¹³ "Omnino vero excludatur celebratio Sacrificii Missae nisi quando gravia adiuncta aliter exigant."—S. C. S. Off. (Bombay), 21 Feb. 1883,—*Fontes*, n. 1079.

¹⁴ The Church is less severe in her discipline regarding the marriages under consideration than with reference to mixed or disparate marriages for which the celebration of Mass is never permitted.

door. It was the nuptial blessing that was given before the altar within the church itself.⁸⁵ The fact that the marriage of Charles, the Prince of Wales, to Henrietta Maria of France, took place on a platform outside the portals of Notre Dame, scarcely affords any proof of a peculiarity of discipline for mixed marriages.⁸⁶ At times a certain significance is attached to the fact that the Catholic, who acted as proxy for the heretical prince Charles, conducted Henrietta Maria as far as the choir of the church, but did not remain in the church for the Mass.⁸⁷ What is of more striking significance is the fact that a Mass was actually celebrated as a complement of the ceremony at the church-door.⁸⁸ But whatever uncertainty may be connected with the discipline of earlier times, it became well established, especially in the nine-

⁸⁵ Dom Chardon quotes the prescriptions of two ancient rituals used in France, which show that the marriage itself took place at the church-door. —*Histoire du Sacrement de Mariage*, Chap. XIII,—Migne, *Theol. Curs. Complet.*, XX, 1026. "It was this 'marriage at the church door' which had to be established according to Bracton, in any question as to the legality or non-legality of the contract. After 'this taking to wife at the church door', the parties entered the church and completed the rite in the church itself."—Gasquet, *Parish Life in Mediaeval England*, New York, 1906, p. 78. (Cardinal Gasquet refers to the custom of the fifteenth century). *The New English [Oxford] Dictionary* (Vol. II, p. 406) refers the word "church-door" immediately to the contracting of marriage. Cf. Salzman, *English Life in the Middle Ages*, London, 1927, p. 254.

⁸⁶ Benedict XIV (*De Synodo Dioec.*, Lib. VI, cap. V, n. 5) gives an interesting description of the wedding.—"*quae nuptiae descriptae habentur etiam [Pope Benedict had already referred to another source] in Historia, seu Commentario, cui titulus MERCURIUS GALLICUS, tom. 2. pag. 359. Narrant itaque, matrimonium inter praedictam Catholicam Principem, et haeretici Regis Procuratorem, extra Ecclesiam contractum fuisse ad limina Ecclesiae Metropolitanae Parisiensis coram Cardinale magno Franciae Eleemosynario, a quo tamen benedictio nuptialis data non fuit: deinde Britannici Regis Procuratorem novam nuptam deduxisse usque ad ingressum Chori: ibi vero a praedicto Cardinale celebratam solemniter fuisse Missam, adstantibus Rege, et Regina Franciae, et nova Magnae Britanniae Regina, ac universa Regia Familia: sed praedictum Regis Angliae Procuratorem, quamvis ipse Catholicus esset, cum personam gereret Principis Anglicanae sectae addicti, in proximum Archiepiscopi Palatium interim accessisse, donec Missa terminaretur, qua demum expleta, ad reducendam ab Ecclesia Regnam accessit.*" In view of the fact that the Mass did take place as an immediate complement of the ceremony outside of the Church, Giovine's full approbation of this procedure must be rejected.—*De Dispens. Matr.*, Tom. I, § CLXXV, n. 8.

⁸⁷ See the preceding note.

⁸⁸ The marriage of Henry of Navarre (later King Henry IV of France) to the Princess Margaret (August 18, 1572) also took place on a platform outside of the church. At this time Henry was a Huguenot, yet a Mass immediately followed at which Henry, however, did not accompany his bride. No dispensation for this marriage had been given by the Holy See. Cf. Van Dyke, *Catherine De Médicis*, 2 vols., New York, 1923, Vol. II, p. 77-78.

teenth century, that mixed marriages were to be contracted outside the church.⁸⁸ Apparently, the Ordinary may permit exceptions to this prohibition for only one reason, namely, to avoid greater evils.⁸⁹ The phrase "*extra ecclesiam*" may be strictly interpreted so that a sacristy may be used for the celebration of mixed or disparate marriages.⁹⁰

§ I. CELEBRATION IN PRIVATE HOUSES

393. Canon 1109, § 2, directs that the celebration of marriages in private houses may be permitted by the local Ordinary only in extraordinary cases and for a just cause. This prescription may be interpreted as referring only to marriages between Catholics. It does not follow, however, that because canon 1109, § 3, forbids the celebration of mixed and disparate marriages in a church, a tacit permission is thereby given to celebrate them in private houses. It would seem to be at variance with the mind of the Church utterly to disregard canon 1109, § 2, when attempting to discern a norm for canon 1109, § 3. What is even more fundamental is that the pastor conduct himself in no way which might normally be construed as implying a favor to the celebration of mixed and disparate marriages.⁹¹ If a mar-

⁸⁸ Pius VI (rescript. ad Card. Archiep. Mechlinien., 13 Iul. 1782, n. 4, —*Fontes*, n. 471) uses the phrase "*non . . . in loco sacro*". The later sources refer to the term "*ecclesia*". Cf. instr. Secret. Stat. iussu Pii PP. IX, 15 Nov. 1858, —*Coll.*, n. 1169; S. C. S. Off., instr. (ad Archiep. Quebecen.), 16 Sept. 1824, ad 5, —*Fontes*, n. 866; (Vic. Ap. Sandwic.), 11 Dec. 1850, ad 22, —*Fontes*, n. 913; instr. (ad Archiep. Corcyren.), 3 Jan. 1871, n. 5, —*Fontes*, n. 1013; (Rosen.), 16 Iul. 1885, —*Fontes*, n. 1094; 29 Nov. 1899, ad 2, —*Fontes*, n. 1230.

⁸⁹ Through force of custom, mixed marriages are today celebrated in churches in many places in Germany and in at least one diocese of Poland. Cf. Hilling, *Das Eherecht des C. I. C.*, p. 125; Synodus Archidioecessana Varsaviensis (ad can. 1102), Stat. 122. In the United States such a custom has apparently never existed.

⁹⁰ Cf. S. C. S. Off., 17 Jan. 1877, ad 2, —*NRT*, XX (1888), 463-464; Chelodi, *Ius Matr.*, n. 141; Vlaming, *Prael. Iuris Matr.*, n. 225; AkKR, CV (1925), 112; Augustine, *Commentary*, V, p. 323. De Smet (*De Spons. et Matr.*, p. 447, not. 3) calls attention, nevertheless, to the danger of celebrating a mixed marriage in a sacristy: ". . . quod in sacristia contracturi sollicitent solemniter ingredi ecclesiam et per eam transire at sacristiam." Cf. Genicot-Salsmans, *Theol. Mor.*, II, n. 516.

⁹¹ ". . . sed alia ex parte abstinere etiam catholicus pastor debet non solum a nuptiis, quae deinde fiant, sacro quocumque ritu honestandis, sed etiam a quovis actu, quo approbare illas videatur." —Pius VIII, litt. ap. *Litteris altero*, 25 Mart. 1830, —*Fontes*, n. 482. Vide etiam Gregorius XVI,

riage between Catholics may not be celebrated in a private home, the pastor's assistance at the celebration of a mixed or disparate marriage in a private home will normally, therefore, be regarded as an act of favor.²⁸ On this principle, therefore, the celebration of mixed and disparate marriages in private houses is forbidden unless the Ordinary in an extraordinary case and for a just and reasonable cause permits it.

ART. VI. PUBLICATION OF THE BANNS

394. Whatever uncertainties may have existed in the law before the Code with reference to the publication of the banns for mixed and disparate marriages,²⁹ they have been solved by the Code in canon 1026; "*Publicationes ne fiant pro matrimoniis quae contrahuntur cum dispensatione ab impedimento disparitatis cultus aut mixtae religionis, nisi loci Ordinarius pro sua prudentia, remoto scandalo, eas permittere opportunum duxerit, dummodo apostolica dispensatio praecesserit et mentio omitatur religionis partis non catholicae.*" The normal rule is, therefore, that the banns are not to be published for mixed and disparate marriages. If the Ordinary deems their publication necessary in a particular case, the permission is to be given only on the following conditions: 1) that all danger of scandal be removed; 2) that a dispensation from the impediment precede their publication; 3) that the religion of the non-Catholic party be not mentioned. If there is a doubt of the existence of other impediments, the pastor is to be guided by canon 1031, § 1, nn. 1, 3. For the examination of the witnesses referred to in canon 1031, § 1, n. 1, many questions are suggested in the instruction of the Holy Office of August 21, 1670.³⁰

ep. encycl. *Summo iugiter*, 27 Maii 1832, § 7.—*Fontes*, n. 484; allocut. *Officii memores*, 5 Iul. 1839.—*Fontes*, n. 492; litt. ap. *Quas vestro*, 30 Apr. 1841, n. 5.—*Fontes*, n. 497; canon 1064, n. 1.

²⁸ "Aus diesem obersten Princip des Gesetzgebers [the concern of the Church that Catholics are to be deterred from mixed and disparate marriages] ist für eine sachgemässe Auslegung zu folgern, dass strengstens alle Handlungen verboten sind, die in ihrem Effekt auf eine Bevorzugung der gemischten Eheschliessungen hinauslaufen oder wenigstens als solche in den Augen des gläubigen Volkes aufgefasst werden können."—Hilling in *AkkR*, CV (1925), 113. Cf. De Smet, *De Spons. et Matr.*, p. 447, not. 3.

²⁹ See Nos. 107-111.

³⁰ *Fontes*, n. 742. Cf. S. C. S. Off., litt. 4 Iul. 1874.—*Fontes*, n. 1031.

§ I. BANNS FOR MARRIAGES BETWEEN CATHOLICS AND CONVERTS

395. The prohibition of canon 1026 must apparently be limited to strictly mixed and disparate marriages" so that if the non-Catholic party is to be received into the Church before the marriage, the normal rule of canon 1022" is to apply." Augustine is of the opinion, however, that while such marriages seem to be governed by canon 1022, there is no need of a dispensation for the omission of the banns for marriages between Catholics and those recently converted to the Church.

However, the text [canon 1022] does not say that *all* Catholic marriages *must* be called, and can. 1028 allows the Ordinaries to dispense for any lawful reason. Neither is the law a perfect one, since it has no penal sanction attached to it. The purpose of the law is to discover impediments. This aim could be attained only in part, since the friends of the former non-Catholic party would hardly attend the service. Besides, the publication of the banns is not intended to arouse curiosity or ridicule or surprise. Finally the instruction will easily permit the pastor to find possible impediments."

396. If, according to Augustine, the banns need not be published for *all* marriages between Catholics, it may be asked what line of demarcation is to be employed? The very fact that the Ordinary *can* dispense for a reasonable cause supposes that the law does extend to *all* marriages between Catholics *unless the Ordinary dispenses*. The statement that the friends of the former non-Catholic party will not attend the service to hear the publication of the banns seems to suppose that an extensive "friendship" is a condition of the effectiveness of the law prescribing the banns. Who were the non-Catholic's friends? Were

" The publication of the banns has evidently never been prohibited by the common law of the Church for marriages prohibited by canons 1065 and 1066. Yet the Ordinary in determining the effectiveness of the removal of scandal in order to permit the pastor's assistance, may likewise forbid the publication of the banns, provided that sufficient care has been taken to discover the possible existence of impediments.

" "Publice a parrocho denunciatur inter quosnam matrimonium sit contrahendum."—Canon 1022.

" Cf. De Smet, *De Spons. et Matr.*, p. 447, not. 1; *AER*, LXXIX (1928), 648.

" *Rights and Duties of Ordinaries*, p. 289.

they all non-Catholics? The supposition, moreover, that the *knowledge of the free status* of the former non-Catholic party is confined to non-Catholic associates is quite gratuitous. There is no general presumption that the publication of the banns in such cases will expose the parties to ridicule,—rather, as the Ecclesiastical Review has it: “it is of some importance that the banns be published in this case that the faithful may know that this is not another mixed marriage.”¹⁰⁰

ART. VII. WHAT PASTOR IS TO ASSIST?

397. Canon 1097, § 2, states that in every case it is to be held as a rule that marriages are to be contracted before the pastor of the bride.¹⁰¹ Does this prescription hold also for mixed and disparate marriages where the non-Catholic party is the bride? Apparently the majority of authors deny that the canon has reference to mixed or disparate marriages.¹⁰² Hilling¹⁰³ draws attention to canon 1964 which rules that if one of the parties is a non-Catholic, the competent judge in a *causa matrimonialis* is that of the domicile or quasi-domicile of the Catholic party. But it is well to note that this prescription seems to apply only with reference to the question of domicile—it does not exclude the place in which the marriage was contracted. To say that on the basis of canon 1964 the marriage must be contracted before the pastor of the Catholic party seems to be begging the question. Moreover, canons 1097, § 2, and 1964 deal with entirely different questions. Woywod, who has receded from his former opinion upholding the reference of canon 1097, § 2, also to mixed marriages,¹⁰⁴ seems to draw the principal argument of his later

¹⁰⁰ AER, LXXIX (1928) 648.

¹⁰¹ “In quolibet casu pro regula habeatur ut matrimonium coram sponsae paracho celebretur . . .”—Canon 1097, § 2.

¹⁰² The same prescription was contained in the decree “Ne Temere” (Art. V, § 5) so that the interpretation of the first three authors will apply also to canon 1097, § 2. Cf. Wernz, *Ius Decret.*, IV, n. 188 in fin.; Cronin, *The New Matrimonial Legislation*, p. 287, note 1; McNicholas, “Difficulties on the New Marriage Legislation”, AER, XXXIX (1908), 35-36; Ayinbac, *Marriage Legislation*, p. 242; Fanfani, *De Iure Parochorum*, n. 309; Hilling, *Das Eherecht des C. I. C.*, p. 107; Woywod, in HPR, XXVIII (1928), 410.

¹⁰³ Loc. cit.

¹⁰⁴ A Practical Commentary, I, n. 1118.

opinion¹⁰⁵ from the fact that since the Church does not deal directly with non-Catholics in the matter of dispensation, the parties to a mixed or disparate marriage would have to approach the pastor of the Catholic party, since the pastor of the non-Catholic party cannot deal directly with her concerning the marriage. This opinion seems to imply either that the pastor of the Catholic party can deal directly with the non-Catholic bride or that the pastor of the non-Catholic bride cannot deal with the Catholic party if he does not belong to his parish. Neither supposition can be sustained. Why may not the pastor of the non-Catholic bride apply for a dispensation for the Catholic party from the Catholic party's Ordinary or from the pastor's own Ordinary (if he be other than that of the Catholic party) as long as the Catholic party is in the diocese at the time the dispensation is to be granted?¹⁰⁶

398. Since the decree "*Ne Temere*" stated the prescription of canon 1097, § 2, in almost identical words,¹⁰⁷ it will be of interest to examine the decision of the Sacred Congregation of the Sacraments¹⁰⁸ with reference to the following case. A certain non-Catholic girl having a domicile in parish *B* wished to marry a Catholic having a domicile in parish *L* of the same archdiocese. Before the marriage, however, the girl took a month's vacation in parish *S* of the same archdiocese. Here she was *baptized* and received into the Catholic Church by the pastor of parish *S*. Only a small part of the month's vacation remained after her entry into the Church and upon its conclusion she returned to parish *B* where she stayed three weeks. Thereupon she went again to parish *S* and on her arrival contracted the marriage (April 28, 1915) before the pastor of parish *S* who did not receive the permission to assist from the pastor of parish *B*. The pastor of parish *B*, regarding himself the proper pastor of the girl, brought the case before the diocesan Matrimonial Tribunal. The diocesan decision was adverse to the claim of the pastor

¹⁰⁵ *HPR*, XXVIII (1928), 410.

¹⁰⁶ This has reference particularly to the faculties given to the Bishops of the United States who may give dispensations from these impediments to non-subjects within the limits of the diocese. See Nos. 249-250.

¹⁰⁷ See Art. V, § 5, of the decree "*Ne Temere*".

¹⁰⁸ *AAS*, VIII (1916), 64-66.

of parish *B*. The case was then submitted to the Congregation of the Sacraments. In the discussion, the following opinion was given by the consultor:

Menstrua commoratio sponsae in paroecia *S* computanda ne est a die eius conversionis ad fidem catholicam, an vero ab eiusdem in paroeciam ingressu? Liquido patet sufficere, ad liceitatem, factum mere externum commorationis, praescindendo a facto conversionis sponsae in fidem catholicam. Porro voluntas legislatoris ex verbis legis petenda est iuxta illud effatum: *Legislator quod voluit expressit*. At in Decr. *Ne Temere* requiritur tantummodo menstrua commoratio alterutrius contrahentis, quin ullus sermo habeatur de eorumdem religione.¹⁰⁹

The decision of the Congregation was to the following effect: "*Rectorem paroeciae S illicite adstitisse matrimonio in casu ob amissam a sponsa, per discessum trium hebdomadarum menstruum commorationem.*"¹¹⁰

399. The opinion expressed by the consultor and the decision itself imply two chief points of interest for the question under discussion, namely: 1) that the pastor of parish *S* had acquired a right to assist at the marriage by reason of the month's stay, even though the girl was *baptized* and received into the Church only during the latter part of the month's stay; 2) that the pastor of parish *B* was the proper pastor of the girl before her Baptism. By the common law of the Church, therefore, the pastor of the bride has the right to assist at the marriage regardless of the religious or baptismal status of the bride.¹¹¹ The question may, however, take on another aspect in many dioceses of this country where the custom seems to exist of giving the right of assisting at the marriage to the pastor of the Catholic party.¹¹² Many of the older diocesan synods granted this right to the pastor of the Catholic party.¹¹³ It is not altogether certain

¹⁰⁹ AAS, VIII (1916), 65.

¹¹⁰ *Ibid.*, p. 66.

¹¹¹ Cf. Durieux, *The Busy Pastor's Book on Matrimony*, p. 60; AER, LXIII (1920), 417-419; LXXVIII (1928), 523-524; LXXX (1929), 200.

¹¹² Cf. HPR, XXVIII (1928), 410.

¹¹³ Statuta Dioecesis Pittsburgensis lata in synodo Dioecesana habita 1844 et in aliis synodis 1846 et 1854 emmendata, n. 16; Synodus Dioecesana

that the custom is universally observed in this country, but it may be said that in those dioceses in which it has existed for forty years or more¹¹⁴ it may be regarded as a valid and legitimate custom retaining its force even after the decree "*Ne Temere*" and the Code. In many dioceses in this country there may be a distinct element of doubt, but this, in conjunction with the opinion of the majority of the authors who favor the pastor of the Catholic party, may, perhaps, be sufficient to constitute a *dubium iuris*, in which case the pastor of the Catholic party, even if the Catholic party be the groom, may assist licitly at mixed and disparate marriages.

Bostoniensis II (1868), n. 126; Wheelingensis IV (1882), n. 85; Albaniensis (1884), n. 100; Constitutiones Dioecessanae Bostoniensis (1886), n. 146; Synodus Dioecessanae Manchesteriensis I (1886), n. 156; Providentien-sis (1887), n. 81; S. Ludovici III (1896), Cap. III, n. 30; Wayne-Castrensis (1903), n. 174; Riverormensis I (1905), n. 97; Chicagiensis (1905), n. 195. A recent diocesan synod approved by Rome evidently prescribed something to this effect. Cf. *AER*, LXXX (1929), 200.

¹¹⁴ See canon 27, § 1.

APPENDIX

THE SACRAMENTAL CHARACTER OF DISPARATE AND MIXED MARRIAGES

ART. I. DISPARATE MARRIAGES

400. For centuries the discussion of disparate marriages has turned to the question as to whether the baptized party in a valid disparate marriage receives the sacrament of Matrimony. There are eminent canonists and theologians who maintain that the baptized party does receive the sacrament¹ though they appear to be greatly outnumbered by those who are of the opposite opinion.² The intrinsic value of the arguments seems to favor the non-reception of the sacrament by the baptized party.

A disparate marriage contracted with a dispensation from

¹ Salmanticenses, *Curs. Theol. Mor.*, Lib. II, Tract. IX, n. 83; Bonacina, *Op. Omnia*, Tom. I, Disp. IX, Quaest. II, Punct. II, nn. 3-4; Frassen, *Scotus Academicus*, Tom. XII, Tract. III, Disp. II, art. I, quaest. II; Ferraris, *Bibliotheca Canonica*, Vol. V, v. "Matrimonium", art. I, n. 19; Perrone, *De Matr.*, Tom. II, cap. VII, art. I; Blicke, *Theol. Univ.*, IV, p. 258; Pesch, *Tract. Dogm.*, VII, n. 728; Sasse, *Instit. Theol. de Sacram.*, Vol. II, p. 390-391; Tanquery, *Theol. Mor.*, I, n. 808; Vlaming, *Prael. Iuris Matr.*, n. 37.

² Pontius, *De Matr.*, Lib. I, cap. 6, nn. 7-10; Lib. VII, cap. 47, n. 8; Sanchez, *De Matr.*, Lib. II, Disp. 8, n. 2; Castropalao, *Op. Mor.*, Pars V, disp. 2, punct. 2, nn. 10-12; Schmalzgrueber, *Jus Eccl. Univ.*, Tom. IV, P. II, Tit. I, nn. 307-308; Vasquez, *Comment. in Tertiam part. S. Thomae—De Matr.*, Disp. II, cap. X, nn. 113-115; Mastrius, *Disp. Theol. in IV Lib. Sent.*, Quaest. I, nn. 37-39; Perez, *De Matr.*, Disp. XIX, Sect. XII, nn. 3-4; Mercerus, *Comment. in Tertiam part. S. Thomae*, suppl., Quaest. 42, prop. II; Pirhing, *Jus Can.*, Tom. IV, Tit. I, Sect. III, n. 71; De Coninck, *De Sacram.*, Tom. II, Disp. 24, n. 24; Leurenus, *Jus Can. Univ.*, Lib. IV, quaest. 83; Schmier, *Jurisprudentia*, Lib. IV, Tract. II, cap. I, nn. 41-42; Pichler, *Jus Can.*, Tom. I, Lib. IV, Tit. I, n. 75; Pappiani, *De Sacram.*, Tract. VII, cap. I, § 13; Sporer, *Theol. Mor.*, Tom. III, pars IV, n. 348; De Justis, *De Dispens. Matr.*, Lib. II, cap. XV, nn. 2-3; Gury, *Theol. Mor.*, Pars II, n. 772; De Augustinis, *De Re Sacram. Prael.*, Lib. IV, p. 230-232; Tepe, *Instit. Theol.*, Vol. IV, n. 763; Heiss, *De Matr.*, p. 12; Pohle, *Lehrb. der Dogmatik*, III, p. 601; Billot, *De Eccl. Sacram.*, II, p. 357-359; Wernz, *Ius Decret.*, IV, n. 44; Cappello, *De Sacram.*, III, n. 36; Chelodi, *Ius Matr.*, n. 6; Petrovits, *New Church Law on Matrimony*, n. 17; De Smet, *De Spons. et Matr.*, n. 179; Leitner, *Lehrb. des kath. Eherechts*, p. 52.

the impediment of Disparity of Cult cannot, indeed, be dissolved *in favorem fidei* but this does not demonstrate that the bond of marriage is sacramental in the Catholic party. When Christ raised marriage to the dignity of a sacrament, He did not thereby add something accidental to the contract, but rather elevated the very contract to a sacrament. Those parties, therefore, who by Baptism are capable of entering a sacramental contract concur as one in positing the matter and form of the sacrament. The result of this action is one and indivisible. It is not a contract plus a sacrament, it is a sacramental contract. If, therefore, the bond exists in both parties, the sacrament must exist in both parties. The sacrament cannot exist in one party alone any more than the contract can exist in one party alone. It is no less illogical to say that the bond is a *vinculum sacramentale* incapable of sacramental efficacy in the unbaptized party than it is to say that the bond is a *vinculum naturale* capable of sacramental efficacy in the baptized party. As a matter of fact, the bond is not sacramental but natural. That is now beyond dispute for a decision of the Holy Office of November 5, 1924 dissolved *in favorem fidei* a valid disparate marriage contracted after the Code without dispensation by a baptized Anglican and an unbaptized party on the ground that it was a *vinculum naturale*.³ It is a *vinculum naturale* for the very reason that the unbaptized party cannot receive the sacrament.⁴ Nor is anything other effected than a *vinculum naturale* if a disparate marriage is contracted with a dispensation. The dispensation removes only the impediment, it does not remove the radical disparity existing between the parties. The unbaptized party is still incapable of receiving the sacrament and the result of the contract is a *vinculum naturale*. It is a natural bond binding both parties equally. It cannot bind the baptized party with greater force *ratione sacramenti*; for the contract cannot limp.⁵ The bond is either natural or sacramental for both.

³ AER, LXXII (1925), 188.

⁴ A further confirmation of this, though less direct, is furnished by the fact that the marriage bond contracted by two infidel parties continues to be a *vinculum naturale* as long as only one of the parties to the bond receives Baptism. It may be dissolved by virtue of the Pauline Privilege,—given the conditions for the valid use of this privilege.

⁵ Cf. Thomas Ap., *Summa Theol.*, III a, suppl., p. 47, art. 4.

401. While it is indeed possible to consider a marriage from two aspects, namely, *ratione sacramenti* and *ratione contractus*, yet the ability to prescind from the one, in the consideration of the other, is a process confined to the logical order. But the possibility of their separation in the logical order in no way posits the possibility of their objective separation in the ontological order. It cannot, therefore, be said that while a marriage cannot limp *quoad rationem contractus*, it can limp *quoad rationem sacramenti*. The bond and the sacrament are inseparable in the ontological order.

402. The fact that the Church does not dissolve *in favorem fidei* a *vinculum naturale* contracted with her dispensation is not based on the intrinsic nature of the bond (which is a natural bond for both parties) but on an extrinsic reason. It would be entirely against good morals for the Church, who had dispensed in order that a natural bond might be effected, to dissolve the bond *in favorem fidei* because of its natural character,—a bond given the full sanction of a dispensation from its beginning. It will not be necessary to call attention again to the fallacy in the argument of those who urge as proof for the Catholic's reception of the sacrament, the fact that the Church has jurisdiction over disparate marriages. The Church has jurisdiction over a disparate marriage by the very fact that one of the parties is baptized.* The argument that the Catholic's special need of sacramental grace in a disparate marriage shows it to be reasonable that he does receive it, is at best an argument *ex convenientia*. On a similar line of reasoning, the non-reception of the sacrament may likewise be one of the reasons why the Church has made a diriment impediment of Disparity of Cult. It is sometimes urged that Christ in instituting the sacrament of Matrimony would not wish the early Christians, who were often by force of circumstance drawn into disparate marriages, to be deprived of the sacrament. The same reason should logically apply to disparate marriages contracted with dispensation in the pagan countries of today, but it is well to call to mind again the constant protests of the Fathers and early councils to such marriages. The memorable words of St. Ambrose are par-

* See Nos. 272-274.

ticularly significant: "*Si Christiana sit, non est satis, nisi ambo initiati sitis sacramento baptismatis . . . Non possunt hoc dispares fide credere, ut ab eo quem non colit putet sibi impartitam gratiam.*"

ART. II. MIXED MARRIAGES

403. On the other hand, since both parties to a mixed marriage are baptized, and since the contract is inseparable from the sacrament, there can be no valid mixed marriage that is not at the same time a sacramental bond.* Christ, in raising to the dignity of a sacrament the contract of marriage established by God, made the very contract a sign efficacious of grace. Substantially, the sacramental rite is the same as that already existing for marriage before the time of Christ. Because of Christ's institution, the giving and receiving of marital consent between the baptized is now a sign of grace independently of man's wish, and including every marriage to be contracted between the baptized. What Christ has instituted as one, namely the contract and the sacrament, cannot be disassociated by the contracting parties. The baptized (in their marriages with the baptized) when positing the rite of marriage effect either a sacramental bond or no bond whatever. Just as the intention of the minister of Baptism is not vitiated by error or false belief concerning the nature or efficacy of the rite he is performing, so neither is the intention of one or both of two baptized parties to a matrimonial contract vitiated by an error or false belief regarding the sacramental efficacy of the rite they mutually perform.* If they

¹ *De Abraham*, Lib. I, cap. 9, n. 84,—MPL, XIV, 451.

² "*. . . inter fideles matrimonium dari non posse, quin uno eodemque tempore sit Sacramentum.*"—Pius IX. allocut. *Acerbissimum*, 27 Sept. 1852, n. 3,—*Fontes*, n. 515. When Pope Urban VIII on March 8, 1633, granted a dispensation from the impediment of Mixed Religion he placed the obligation upon the Catholic party (Wolfangus, Dux Neoburgi) to warn his heretical spouse (Catherina Carlotta Principis Bipontini filia) that if she did not return to the Church before she received the sacrament, she would sin gravely: "*Coniugem suam commoneat, quatenus non respiscat in Domino, sed in errore persistat, ipsam graviter peccaturam, si ad hoc unum ex Ecclesiae Sacramentis accedat, antequam Romanam Ecclesiam communem Fidelium Matrem agnoscat.*"—Albitius, *De Inconstantia in Fide*, Cap. XXXVI, n. 210.

³ Pope Pius X, through the Holy Office, condemned the following proposition: "*Matrimonium non potuit evadere sacramentum novae legis nisi serius in Ecclesia; siquidem ut matrimonium pro sacramento haberetur necesse erat ut praecederet plena doctrinae de gratia et sacramentis theologia explicatio.*"

mutually exchange marital consent they implicitly intend what Christ instituted as the rite of the sacrament, namely the external giving and receiving of the *ius coniugale*. If one or both of the parties *de facto* formally and absolutely withholds the intention of conferring the sacrament the contract itself is void since the contract and the sacrament are inseparable.¹⁰

—S. C. S. Off., decr. *Lamentabili*, 4 Iul. 1907,—*Fontes*, n. 1283. Cf. Sasse, *Instit. Theol. de Sacram.*, Vol. II, p. 389.

¹⁰ Cf. De Lugo, *Tract. de Virt. Fidei Div.*, Disp. XXII, n. 34; Schmalzgrueber, *Jus Eccl. Univ.*, Tom. IV, P. I, Tit. I, nn. 303-304; Estius, *In IV Lib. Sent. Comment.*, Dist. 39, § 4; Carriere, *Prael. Theol.*, I, n. 152; Ballerini-Palmieri, *Op. Theol. Mor.*, Tract. X, Sect. VIII, n. 217; Scavini, *Theol. Mor.*, Lib. II, nn. 726-727; Gury, *Theol. Mor.*, Pars II, n. 772; Sasse, *op. cit.*, Vol. II, p. 388-389; Cappello, *De Sacram.*, III, n. 33; Cerato, *Matr.*, n. 1.

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IN

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Apud Universitatem Catholicam Americae

CONSEQUENDUM

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BIOGRAPHICAL NOTE

Francis J. Schenk was born April 1, 1901, at Superior, Wisconsin. After a grade school education at Gaylord, Minnesota, he was graduated successively from the high school and collegiate departments of the College of St. Thomas, St. Paul, Minnesota, where he received the degree of Bachelor of Arts. His philosophical and theological studies were made at the St. Paul Seminary, and upon their completion he received the degree of Bachelor of Sacred Theology from the Catholic University. He was ordained to the Holy Priesthood on June 13, 1926. In the fall of the same year he was sent by Archbishop Dowling to the Catholic University to pursue a graduate course of studies in Canon Law.

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